SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1966~~ 133

RUBY KOLOD, WILLIE ISRAEL ALDERMAN AND FELIX ANTONIO ALDERISIO, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Ruby Kolod, Willie Israel Alderman and Felix Antonio Alderisio pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on February 3, 1967.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is printed in Appendix A hereto, *infra,* p. 1a.

JURISDICTION

The judgments of the Court of Appeals were entered on February 3, 1967. S.R. VIII and IX;[1] Appendix A, *infra*, p. 20a. Rehearing was denied on March 8, 1967. S.R. XI. By order of Mr. Justice White, dated March 22, 1967, the time for filing this petition was extended to May 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where (1) the indictment charges the utterance of threats in interstate telephone conversations, (2) the evidence is uncontradicted that the defendant held those conversations in an office in his business premises, and (3) the FBI, through illegal electronic eavesdropping in that office, overheard everything there spoken

[1] The record herein consists of the following:

(1) The three volumes of the record on appeal to the Tenth Circuit, paginated from 1 to 519, herein cited as "R. —."

(2) The supplementary record of proceedings on appeal and on limited remand, with the exception of the transcript of the hearing on remand, consisting of twelve separately numbered items. This supplementary record will be cited herein as "S.R.," the particular item being designated by roman numbers and the page reference by arabic numbers, e.g., "S.R.VII, 5."

(3) The five volumes of the transcript of the hearing on remand, transmitted by the Clerk of the Tenth Circuit to the Clerk of this Court by letter of March 30, 1967. This transcript will be cited as "T.", with the volume designated by roman numbers and the page reference by arabic numbers, e.g., "T.IV, 23."

(4) Sealed material transmitted by the Clerk of the Tenth Circuit to the Clerk of this Court by letter of March 30, 1967. The said material has never been seen by the petitioners or any of their counsel and will not be cited herein.

during the time in question, but heard nothing pointing to defendant's guilt:

(a) Whether the defendant is entitled to surrender of the records of the eavesdropping.

(b) Whether the defendant is entitled to inspect the said records.

(c) Whether the defendant is entitled to adduce the said records and the testimony of the eavesdropping agents as evidence that he did not utter threats.

(d) Whether, by an *ex parte* judicial finding based on its *in camera* examination of FBI records, the trial court may constitutionally decide that the defendant's sworn testimony that he had telephoned from the eavesdropped room was false, thereby depriving the jury of the function of determining credibility.

(e) Whether such a judicial finding may constitutionally be based on secret evidence withheld from the defense.

2. Whether, in a case where the government has admitted illegal FBI eavesdropping in premises belonging to one of the defendants and defense counsel has represented in open court the existence of newly discovered evidence of additional illegal eavesdropping in premises belonging to another of the defendants, the government is obligated either to deny the alleged additional eavesdropping or, if not denying it, to disclose its details to the defense.

3. Whether, in a prosecution for conspiracy to transmit threats in interstate commerce in violation of 18 U.S.C. § 875(c), part of the recent body of statutes using the commerce power as a basis for federal juris-

diction over criminal behavior, the accused is entitled to an unambiguous jury instruction that *scienter* of the agreement to use interstate commerce is an essential element of the offense.

4. As to petitioner Alderisio only, whether, when a defendant introduces no evidence in defense, but moves for judgment of acquittal at the conclusion of the prosecution's case, a denial of that motion may be affirmed on the basis of evidence introduced in his co-defendants' case.

STATUTES INVOLVED

Title 18, United States Code, Section 371:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Title 18, United States Code, Section 875(c):

> "Whoever transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

STATEMENT

Background Facts

The petitioners were convicted in the United States District Court for the District of Colorado under the first count of an indictment charging them and another person,[2] under 18 U.S.C. § 371, with conspiracy to violate 18 U.S.C. § 875(c) by transmitting in interstate commerce communications containing threats to injure one Robert Sunshine.[3] App. A, *infra*, p. 2a. They were sentenced as follows: Kolod—four years and a fine of $7,500; Alderman—three years and $5,000; and Alderisio—four and one-half years and $7,500. R. 18-20.

The background facts were never in dispute: In June 1959, Kolod invested $78,150 with Sunshine and others in an oil-lease venture, $68,150 of that amount being deposited in escrow with Sunshine pending fulfillment of certain conditions. Alderman then acquired half of Kolod's interest. Sunshine invaded the escrow without fulfillment of the conditions and, by October 1960, had dissipated the entire amount. Kolod and Alderman accused Sunshine of having swindled them and demanded restitution. Their demands continued throughout 1961 and 1962, in many interstate

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[2] The fourth defendant, one de Pietto, was acquitted by the jury. App. A, *infra*, p. 2a.

[3] A second count had charged Kolod, Alderisio and de Pietto with violating 18 U.S.C. § 875(b) in connection with a specific telephone conversation between Kolod and Sunshine on July 6, 1961. R. 8. Sunshine testified that Alderisio, accompanied by de Pietto, visited him in his Denver office, stated that Kolod had sent him to kill Sunshine, telephoned Kolod and put Sunshine on to speak to him. R. 56-59. Kolod testified that the call came from Sunshine directly. R. 315. In any event, the jury acquitted all three defendants on that count. App. A, *infra*, p. 2a.

telephone conversations between Kolod and Sunshine and a few between Alderman and Sunshine. The calls stopped only when Sunshine was indicted for an unrelated embezzlement in December 1962. App. A, *infra,* pp. 2a-3a, 5a-6a.

Sunshine testified that numerous threats had been uttered in those telephone conversations. R. 41, 47-49, 52-55, 69-72, 162-63. Kolod and Alderman denied it. R. 328, 350-51, 354, 359, 381, 446, 456, 467. The trial, as the Court of Appeals noted, was a "contest of credibility" on the issue whether threats were made in the conversations and the "thread of credibility" supporting the government's case was "tenuous." App. A, *infra,* pp. 6a, 8a. In three separate judicial proceedings, Sunshine had admittedly perjured himself concerning his transaction with Kolod. R. 104-10. He also admitted a long string of false statements in letters to Kolod and Alderman. R. 110-25.

The FBI Eavesdropping

Kolod testified that, for many of his conversations with Sunshine, including those in the last nine months of 1965, he had used the telephone in the executive conference room of his place of business, the Desert Inn, of which he was an owner and manager. R. 328; T. IV, 71. To corroborate his testimony that he had not threatened Sunshine, he made a proffer of proof that agents of the FBI had planted an eavesdropping device in the conference room, through which they had overheard every word he spoke and had never heard a single threat. The proffer was as follows (R. 412-18):

(1) On March 22, 1962, the FBI surreptitiously planted an electronic listening device in the conference room.

(2) The FBI had earlier leased twenty-five lines from the local telephone company. Through one of those leased lines it linked the listening device to its Las Vegas headquarters. The telephone company was instructed to bill the leased line first to "Henderson Novelty Company" and later to "Clarke Associates," both fictitious firms. Although both of those fictitious firms used the FBI's Las Vegas address, the telephone company was instructed to mail the bills to a post office box rented by "Fred Emery," a fictitious name used by an FBI agent. The bills were paid by government checks. This arrangement continued until August 1963 when a Desert Inn investigator discovered the listening device and the FBI ordered the leased line discontinued.

(3) Every word spoken by Kolod in the conference room from March 22, 1962, to the end of that year was conveyed over the leased line to FBI headquarters and there overheard by an FBI agent.

(4) Had there been threats, the FBI agents would have heard and recorded them.

(5) The agents neither heard nor recorded any threats.

In connection with its proffer, the defense requested production of the FBI's records of the eavesdropping. The trial court denied this request, but, instead, inspected the records *in camera* to determine whether they supported "the credibility of the defendants' testimony." App. A, *infra,* p. 8a. Finding no mention of any Kolod-Sunshine conversations in the eavesdropping records, the trial court concluded that Kolod had testified falsely when he claimed to have used the

conference room telephone (R. 516-17) and it rejected the proffer as a "fishing expedition", which would confuse and prejudice the jury with irrelevant evidence against the FBI. App. A, *infra,* p. 8a.

In their appeal the petitioners argued (1) that it was error to base the ruling on the proffer on FBI records never shown to the defense; (2) that the records, even if they showed no Kolod-Sunshine conversations, did not negate Kolod's testimony, because routine conversation, containing nothing of interest to the FBI, could be expected not to be mentioned in the records; and (3) that even if the FBI records tended to contradict Kolod's testimony, the credibility judgment was for the jury, not the court.

Although the government had assured the trial court that the documents originally submitted for *in camera* inspection constituted "the entire file relating to this matter" (R. 428-29), during the pendency of the appeal, it advised the Court of Appeals that it had discovered additional FBI records of the Desert Inn eavesdropping. The case was then remanded to the trial court for *in camera* inspection of the additional 700-odd pages of records and for a hearing to determine the subjective knowledge of the FBI agents about the Kolod-Sunshine conversations. App. A, *infra,* pp. 9a-10a. In the post-trial hearing, the records were again withheld from the defense and were again found devoid of any reference to Kolod conversations. App. A, *infra,* pp. 10a-11a. The government stipulated that there had in fact been an eavesdropping device in operation at the Desert Inn from March 22, 1962, to August 15, 1963. T. I, 13-14. From the testimony of the FBI agents, it is clear that Kolod was one of the tar-

gets of the eavesdropping.[4] The device was monitored by some twenty agents or employees in a room at the FBI's Las Vegas headquarters. T. II, 20-22. Through the leased telephone line, the device was connected to an amplifier in the FBI office and thence to a loudspeaker, a head-set and a tape recorder. The monitors could hear, either through the loudspeaker or the headset, all normal speech occurring in the Desert Inn executive conference room and, by flipping a switch, could record it. App. A, *infra*, p. 7a.

The FBI agents who testified at the post-trial hearing had no significant independent recollection of what they had heard; they based their testimony upon what appeared in the FBI records of the eavesdropping. T. II, 39; III, 16, 34, 87-89, 113-15, 131-33; IV, 24-25, 33, 37, 42, 52, 69. The records in question were of two types: (1) logs made by the monitors; and (2) summaries or transcripts of recorded conversations, made by a reviewing agent after playing back the tapes. The tapes themselves had been erased after review. App. A, *infra*, p. 7a.

It is clear from the testimony of the FBI agents that much of what the device picked up was not recorded, so that it could not have found its way into the summaries or transcripts. The Special Agent in

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[4] Special Agent Toolson, in an attempt to lend significance to the almost complete absence of Kolod's name from the bugging logs, testified, on the basis of his physical surveillance of Kolod, that Kolod was "a downstairs man" and "didn't go to the executive offices of the upstairs." T.IV, 60. One of the FBI's monitors, however, testified that Toolson gave the various monitors a list of "the principal people that would be close to the device" (T.IV, 28) and whose conversations, therefore, could be expected to be picked up. *That list contained Kolod's name.* T.III, 75-76.

Charge of the Las Vegas office and the agent in charge of the Desert Inn eavesdropping both testified that the monitors had been instructed to tape only what was significant and pertinent. T. II, 23, 25, 33-34, 50, 59-60, 62; IV, 63. Various monitoring agents testified that they had exercised discretion as to what to record. T. III, 12, 41, 46, 50-51, 80, 107. Moreover, much of what was recorded was omitted by the reviewing agent from the summaries or transcripts. T. II, 35, 49; III, 41-42; IV, 66. It is also clear, at least as to some of the monitors, that much of what the device picked up was never even logged. The Special Agent in Charge testified that the monitors had discretion as to whether to log seemingly insignificant material. T. II, 62-63. Another agent testified that each monitor would log "any activity which he found pertinent." T. III, 12. One of the monitors testified that he had monitored six devices simultaneously (T. III, 110) and that, if, while he was listening to one, something came over the other, he would simply record the second, without making any log entry other than the fact that he had switched on the recorder. T. III, 120-21. Another monitor, in the same situation, actively monitored one device and kept the recorders on for the other five, the only log entries as to each of those five being the time at which the recorder was switched on at the beginning of his shift and the time at which it was switched off at the end. T. IV, 34-35. How selective the logging was is indicated by the testimony of one monitor that he had logged only one conversation in four-and-a-half days of listening. T. III, 127-34. A further indication of the selectivity of the logging is that there were only about 700 pages of logs covering the operations of a busy executive office over a period of 510 days. App. A, *infra*, p. 10a.

The trial court, however, made a finding that, although not everything was recorded, everything was logged.[5] Using that finding as its first premise and, as its second premise, its *in camera* finding that the FBI records showed no Kolod conversations, the court concluded that Kolod had not used the conference room telephone for his conversations with Sunshine and that the proffer was, therefore, irrelevant. T.V, 13-14; S.R. IV, 4.

The Court of Appeals, affirming the rejection of the proffer, went beyond even the trial court's finding. It declared that everything was both logged and recorded.[6] Impressed by its erroneous view of the facts, the Court held that "Kolod's credibility would be negatived" by the proffered evidence, so that the proffer was irrelevant. App. A, *infra*, p. 11a. As to the conflict between Kolod's insistence that he had used the conference room telephone and the possible inference from the agents' testimony that he had not, the Court refused to allow a jury to resolve it. The Court said:

> "Such a nebulous conflict had no probative value in the trial issues and obviously would lead to a dramatic but immaterial diversion to a side issue if submitted to the jury." (*Ibid.*)

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[5] The trial court said:

"Whenever voices were heard over the amplifier, an entry was made in the log and usually the tape recorder was turned on to record the activity. . . ." S.R.IV, 2.

[6] The Court of Appeals said:

"Clerks in the office of the Bureau in Las Vegas would listen to loud speakers and record on log sheets any activity during the monitoring period. Whenever voices were heard an entry would be made on the log sheet and a tape recorder immediatly turned on." App. A, *infra*, p. 7a.

The Court of Appeals also affirmed the trial court's denial of all of the petitioners' requests for access to the FBI records upon which all the post-trial testimony was based.

At the post-trial hearing, counsel for petitioner Alderisio stated to the court that there was newly discovered evidence of a "wire tap or listening device" used against his client in Chicago between October 1, 1960, and December 31, 1962. The court sustained government objections to counsel's attempts to elicit from an FBI witness any information about this device. Counsel's contention that the government had a duty to come forward with such information was ignored by both the government and the court. T. IV, 98-100.

The Requested Instruction

Petitioners Kolod and Alderman both testified and both denied having threatened Sunshine. Since petitioner Alderisio did not testify, that part of Sunshine's testimony dealing with the face-to-face threats allegedly made by Alderisio during his visit to Sunshine's office in Denver on July 6, 1961,[7] stood undenied on the record. Petitioners were insistent, therefore, that the jury be properly instructed that the case involved interstate telephone transmission, not interstate travel.

As to Count Two, the court charged the jury that transmission "in interstate commerce by telephone" was an essential element of the offense. R. 498. The jury acquitted on that count. R. 12-13.

As to Count One, the trial court denied the petitioners' requested instruction that an essential element

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[7] *Supra* note 3.

of the offense was *scienter* that one or more threatening interstate telephone calls would be made. R. 505. The portion of the judge's charge to the jury dealing with Count One contained no other instruction that such *scienter* was essential. R. 495-98. In rejecting the petitioners' assertion of error in this connection, the Court of Appeals pointed to the instruction, located in the middle of that portion of the judge's charge dealing with Count Two, "that the transmission of a telephonic conversation by telephone wires from one state to another state constitutes transmission in interstate commerce of a communication within the meaning of the statute upon which the indictment in this case is based." R. 498; App. A, *infra,* pp. 17a-18a.

Petitioner Alderisio's Acquittal Motions

Petitioner Alderisio moved for judgment of acquittal at the conclusion of the government's case and again at the conclusion of the entire case. Both motions were denied. R. 282-83, 289-90, 484-85. Although the other petitioners presented evidence in defense, Alderisio did not. R. 476.

The Court of Appeals affirming Alderisio's conviction, treated both acquittal motions together and held that their denial was proper because, by "inferences from the record," he was connected to the federal element of the crime, "*i.e.,* the agreement to use interstate communication facilities for the unlawful purpose of making threats." App. A, *infra,* p. 19a. In reciting the "record" from which it drew its "inferences", the Court included the following facts: (1) that Alderisio had known the petitioners for ten years; (2) that he had been a guest at the Desert Inn several weeks before his visit to Sunshine; and (3) that, on

that occasion, he had received a Desert Inn check for $16,000 after Kolod had given the hotel teller that amount in cash. App. A, *infra*, p. 4a; see R. 508-09. These facts were not part of the government's case, but came into the record after Alderisio's first motion for acquittal was denied, in the course of his co-defendants' defense. R. 352-56. Alderisio's argument, on petition for rehearing (S.R.X, 9), that he was entitled to acquittal on the basis of the record as it stood at the conclusion of the government's case was ignored by the Court of Appeals. S.R.XI.

REASONS FOR GRANTING THE WRIT

1. This case confronts the Court with a new aspect of the problem of illegal[8] government eavesdropping. Hitherto convictions have been challenged because of the possibility that the prosecution may have derived some advantage from the illegal snooping. Here, the tables are turned. The victim agrees that the eavesdroppers heard nothing in any way helpful to the prosecution, but he asserts that what they heard—or failed to hear—would be helpful to the defense. Accused of having made threats, he sought to lay before the jury evidence that he had had uninvited "ear-witnesses" whose failure to remember any threats would corroborate his own denial of threats.[9] As the court below said, "If, in fact, the agents had listened

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[8] The illegality of the eavesdropping here, assumed throughout the proceedings below, is not open to question. The physical intrusion by which the listening device was installed suffices to make the whole operation illegal. *Silverman* v. *United States*, 365 U.S. 505, 510-12.

[9] Such "negative evidence" "may even sometimes be stronger than affirmative impressions." 2 Wigmore, *Evidence* § 664, at 778 (3d ed. 1940); and cases there cited.

to Kolod-Sunshine calls and recalled no threats, the testimony would clearly be probative and proper for jury consideration." App. A, *infra,* p. 10a. This conviction is challenged because both courts below permitted the government to suppress the evidence it had illegally obtained and to deprive the defense of its use.

Where the victim of the eavesdropping asserts that its fruits may have been used against him, the Court has held him entitled to full exploration at his trial of the extent to which the case against him may have been derived from the government's misconduct. Despite the Solicitor General's suggestions that post-trial hearings are a sufficient remedy in such cases, the Court's solution has been to vacate the convictions and remand for new trials. *Black* v. *United States,* 385 U.S. 26; *O'Brien* v. *United States,* No. 823, Oct. Term 1966, 35 U.S. L. Week 3329, March 21, 1967. Even the dissenting justice in *O'Brien,* although denying the necessity of a new trial, granted the necessity of a "full hearing." 35 U.S. L. Week at 3330.

In the trial of the case at bar, the government showed the trial judge what purported to be all of the FBI's records of the Desert Inn eavesdropping. He refused to allow defense counsel to examine those records, but, from his own perusal of them, found that they made no reference to the conversations in which Kolod had allegedly made the threats. Thus finding, and in utter disregard of uncontradicted evidence before the jury that the conversations in question had been from the "bugged" room, the judge concluded that they had not and that the proffered evidence was, therefore, irrelevant. The jury, of course, could have credited the evidence it had heard that Kolod had, in-

deed, spoken in the "bugged" room and, but for the exclusion of the proffered evidence, the jury could have accepted the defense argument that, had those conversations contained threats, the FBI records would have noted them.[10] By determining, as a basis for rejecting the proffer, that Kolod's unchallenged trial testimony was incredible, the trial court invaded the area reserved exclusively to the jury, *Wilson* v. *United States,* 162 U.S. 613, 621, and, in effect, directed, *pro tanto,* a judgment of conviction. *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 408.

Even assuming the court could properly usurp the jury's function, to make a finding on evidence not disclosed to the party affected ignores the most fundamental requirements of due process. *United States* v. *Abilene & Southern Railway Co.,* 265 U.S. 274, 286-90. This error taints the judgment below not only to the extent that it relied on the *in camera* inspection of the original FBI records and the second batch of records produced at the post-trial hearing, but also to the extent that it relied on the post-trial testimony of the FBI agents. That testimony was no more than a reflection of the contents of the records. In effect, the agents testified to what the records contained, for they had no independent recollection. When an agent said he had no knowledge that Kolod had used the telephone in the "bugged" room, all he was saying was that he could not find from the FBI records that Kolod had used that telephone. T.IV, 33, 51-52. Both the rulings of the trial court and the judgment of the Court of Appeals, therefore, rested on findings drawn,

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[10] In the post-trial hearing, one of the FBI agents testified that he would have recorded any threat he heard. T.III, 116.

in the final analysis, from material which was never in evidence and which the defense never saw.

The stubborn refusal to vouchsafe to defense counsel so much as a glance at the eavesdropping records upon which the courts below based their determinations mocks this Court's oft-expressed views on the Fourth Amendment and on federal discovery procedure. The government's illegal eavesdropping was directed against suspected criminal practices by the owners and operators of the Desert Inn, of whom petitioner Kolod was one. T.IV, 54-56, 71. Overheard were the private conversations held in the Inn's executive conference room. Since the spoken word, no less than papers and other property, comes within the ambit of the Fourth Amendment, *Wong Sun* v. *United States,* 371 U.S. 471, 485, petitioner Kolod, in the circumstances of this case, was entitled to recover from the government what it had unlawfully stolen from his premises. Even if the papers on which the government agents wrote down the purloined conversations are technically government property, effective implementation of the Fourth Amendment requires that they be surrendered to Kolod. But, whether or not he could have compelled surrender of the papers, he had an absolute right to take back, by inspection and copying, the words written on them.

Defense reliance on the liberal discovery policies exemplified in *Jencks* v. *United States,* 353 U.S. 657, and *Dennis* v. *United States,* 384 U.S. 855, was brushed aside below on the ground that the FBI agents, in testifying from the records in question, were not prosecution witnesses whom the defense needed to cross-examine, but rather defense witnesses. App. A, *infra,* p. 11a. According to the Court of Appeals, "*Jencks*

was designed to prevent a holding back of evidence relating to the prosecution's case. . . ." (*Ibid.*) The FBI agents were defense witnesses only in the technical sense that they would not have been in court had not the defense called them. To take so narrow and formalistic a view of the case and, on that account, to refuse to follow the spirit of *Jencks* and *Dennis* is to ignore the salient principle that neither courts nor prosecutors are permitted to frustrate the production of evidence which may tend to exculpate the accused. See *Brady* v. *Maryland,* 373 U.S. 83, 87-88; *Alcorta* v. *Texas,* 355 U.S. 28; *Gordon* v. *United States,* 344 U.S. 414, 419.

2. In *Black* v. *United States,* 385 U.S. 26, after denial of the petition for certiorari, 384 U.S. 927, the Solicitor General advised this Court voluntarily that the FBI had illegally eavesdropped on the petitioner's hotel suite in connection with an unrelated matter. The Court thereupon ordered the government to file a statement of the details of the eavesdropping activities. 384 U.S. 983. After the required statement had been filed, the Court vacated the conviction. 385 U.S. at 29. Those proceedings in *Black* exemplify the policy, both of the Court and the Solicitor General,[11] that the government, as a matter of course, make full disclosure to the victims of its illegal eavesdropping activities. That policy placed an obligation upon the government when petitioner Alderisio's counsel announced in open court

[11] In *Granello* v. *United States,* No. 750, Oct. Term 1966, 35 U.S.L. Week 3376, April 25, 1967, the Solicitor General declared that the petitioner would be furnished with the logs of illegal eavesdropping in business premises owned by an acquaintance of the petitioner in which the petitioner "may have had a proprietary interest."

that evidence had been newly discovered of "bugging" of Alderisio in Chicago, either to deny the "bugging" or to disclose the details. The government's failure to do either and the court's frustration of defense efforts to elicit the information from an FBI witness at the hearing require this Court's intercession.

3. The statutory base of the conspiracy count of which petitioners were convicted, 18 U.S.C. § 875(c), is part of that expanding [12] body of statute law whereby the federal government, under the commerce power, undertakes to police deviant behavior previously left to state and local jurisdiction. The gravamen of the offense under such statutes is and must be the federal element, "the intent of the defendant in regard to the interstate aspect of the offense." *Harms* v. *United States,* 272 F. 2d 478, 481 (4th Cir. 1959). Nor can the prosecution obviate the necessity of proving that key element by indicting, as here, under 18 U.S.C. § 371 for conspiracy to violate the statute, for such a conspiracy charge "cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States.'" *Ingram* v. *United States,* 360 U.S. 672, 677-78, quoting *Pereira* v. *United States,* 347 U.S. 1, 12. As was said in *Twitchell* v. *United States,* 313 F. 2d 425, 428 (9th Cir. 1963), "federal courts must be on guard against attempts to convert what are essentially offenses against state laws into federal crimes via the conspiracy route." So, in various areas where federal jurisdiction has been created by introducing a federal element into an otherwise local crime, the courts have held that there can be no conviction without *scienter* of the federal element of the offense. See, for example, *Ingram* v. *United States,* 360 U.S.

[12] See, *inter alia,* 18 U.S.C. §§ 1084 and 1952.

672, 677 (federal gambling tax); *Carbo* v. *United States*, 314 F. 2d 718, 733 (9th Cir. 1963) (threats by interstate communications with intent to extort, the statute involved in Count Two in the instant case); *Lubin* v. *United States*, 313 F. 2d 419, 420 (9th Cir. 1963) (theft of federally protected bank property); *United States* v. *Bufalino*, 285 F. 2d 408, 416 (2d Cir. 1960) (perjury); *United States* v. *Moloney*, 200 F. 2d 344, 347 (7th Cir. 1952) (threats by mail); *United States* v. *Crimmins*, 123 F. 2d 271, 273-74 (2d Cir. 1941) (interstate transportation of stolen property).

Thus viewed, the failure to instruct the jury, as requested by petitioners, that *agreement to use interstate telephone communications* was an essential element of the offense invited the jury to expand federal criminal jurisdiction to purely local crime. The prosecution, in addition to evidence of threats by interstate telephone, had introduced evidence that petitioner Alderisio had threatened Sunshine in person on July 6, 1961, after *interstate travel* from Illinois to Colorado. Absence of an instruction on agreement to use the telephone permitted the jury to convict of conspiracy to threaten by interstate travel, something which may have been a state crime, but was not a federal crime.[18]

That portion of the instructions to the jury which the Court of Appeals found to be an adequate substitute for the requested instruction seems, from a reading of the instructions as a whole, to have been directed

[18] Interstate travel for the purpose of extortion did not become a federal crime until September 13, 1961, over two months after Alderisio's visit to Sunshine's office, with the adoption of 18 U.S.C. § 1952. This case was, of course, not brought under that statute.

toward Count Two of the indictment. Moreover, even if treated as applying to Count One as well, the language is patently insufficient to satisfy the law's requirement. The jury was instructed that "the transmission of a telephonic conversation by telephone wires from one state to another state constitutes transmission in interstate commerce. . . ." R. 498. But the jury was not instructed that transmission by telephone was the *only* form of transmission in interstate commerce on which they could base a conviction. Nothing prevented the jury from convicting all three petitioners on a theory that two of them had sent the third from one state to another to threaten Sunshine.[14]

4. When petitioner Alderisio moved for judgment of acquittal at the end of the government's case, the trial court marshalled the evidence of his involvement in the alleged conspiracy. It consisted solely of Sunshine's testimony about the July 6, 1961, visit to his office: that Alderisio had threatened him and told him that Kolod could call off the threat; that Alderisio, at Sunshine's suggestion (App. A, *infra*, p. 4a.), had then telephoned Kolod and put Sunshine on; and that Kolod had then called off the threat. There was nothing to show that Alderisio knew what Kolod had said to Sunshine.[15] R. 289-90. The motion was denied because this evidence was held to support a conspiracy "to

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[14] The Court of Appeals assumed that the petitioners had conceded that the language of the instruction was legally sufficient. App. A, *infra*, p. 18a. As shown by the petition for rehearing, however, the assumption was erroneous. S.R.X. 7-8.

[15] It was not the court's theory that a threat had been made in that telephone conversation, but rather that a threat had been lifted. R. 290. Moreover, the court later explained the jury's acquittal verdict on Count Two as a finding that the conversation had contained no threat. R. 509-10.

force Mr. Sunshine to pay over these funds out of fear of physical harm." R. 290. What the trial court ignored was that the charge was not conspiracy to threaten, but rather conspiracy to threaten by interstate telephone. There being no evidence of *scienter* on Alderisio's part of the federal element of the offense, namely, that threats were to be made by interstate telephone, he should have been acquitted. "Without the knowledge, the intent cannot exist." *Direct Sales Co.* v. *United States,* 319 U.S. 703, 711.

The Court of Appeals, seeking to support the denial of the motion by "inferences from the record," committed error, conscious or unconscious, by including, as ground for its inferences, facts which were not in the record when the motion was made and denied. The error became conscious and intentional when it was brought to the attention of the Court of Appeals on petition for rehearing (S.R.X, 9) and that court failed to correct it. Assuming the continuing validity of the doctrine that a defendant, by presenting a defense, waives the erroneous denial of his motion for acquittal, such waiver can occur only where *"the defendant* introduces evidence in his own behalf after his motion for acquittal has been overruled." *United States* v. *Calderon,* 348 U.S. 160, 164. By basing its affirmance on evidence introduced not by Alderisio, but rather by his co-defendants in their own behalf, the Court of Appeals has given the waiver doctrine greater scope than it has ever had in any court. By contrast, the Court of Appeals for the District of Columbia, while not ruling on the validity of the waiver doctrine, strongly disapproved it and declared that, in any case, a defendant's motion is not waived by his co-defendant's testimony. *Cephus* v. *United States,* 324 F. 2d 893, 897 (D.C. Cir. 1963). Judge Wright, concurring, found "that archaic doctrine . . . without validity in any

case." 324 F. 2d at 898. A New Jersey court, half a century ago, rejected the waiver doctrine with the criticism that:

> ". . . by force of a ruling that was wrong when made, testimony that the defendant ought not to have been required to give at all may be laid hold of to sustain the wrongful ruling by which he was required to give it. This comes perilously near compelling the accused to convict himself. . . ."

State v. *Bacheller,* 89 N.J.L. 433, 436, 98 Atl. 829, 830 (N.J. Sup. Ct. 1916). It is submitted that the conflict between an approach which expands the waiver doctrine and one which abolishes, or at least narrowly confines it, going to the core of our accusatorial system of criminal justice,[16] is an appropriate subject for this Court's review.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[16] See Comment, *The Motion For Acquittal: A Neglected Safeguard,* 70 Yale L.J. 1151 (1961).

APPENDIX A

Opinion

(Filed Feb. 3, 1967)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

January Term, 1967

No. 8268

RUBY KÓLOD, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

No. 8269

WILLIE ISRAEL ALDERMAN, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

No. 8270

FELIX ANTONIO ALDERISIO, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the District of Colorado

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Edward Bennett Williams (Harold Ungar, Washington, D.C., for Appellant Ruby Kolod; William P. Johnson and Donald L. Giacomini, Denver, Colorado, for Appellant

Willie Israel Alderman; W. H. Erickson, Denver, Colorado, for Appellant Felix Antonio Alderisio; were with him on the brief) for Appellants.

James A. Clark and William S. Lynch (Lawrence M. Henry, United States Attorney, Denver, Colorado; Brian P. Gettings, Washington, D.C.; and Phillip R. Michael were with them on the brief) for Appellee.

Before MURRAH, Chief Judge, and LEWIS and BREITENSTEIN, Circuit Judges.

LEWIS, Circuit Judge.

Appellants were convicted by a jury in the United States District Court for the District of Colorado under the first count of an indictment charging a conspiracy to transmit in interstate commerce communications containing threats to injure and murder one Robert Sunshine in violation of 18 U.S.C. § 371 and 18 U.S.C. § 875(c). Another co-defendant, Americo Di Pietto, was acquitted of that charge. Appellants Kolod and Alderisio and co-defendant Di Pietto were indicted in a second count for transmission in interstate commerce of communications containing threats to injure Sunshine with intent to extort from him approximately $65,000 in violation of 18 U.S.C. § 875(b). The jury acquitted all three of this charge. The court sentenced appellant Kolod to imprisonment for a term of four years and a fine of $7,500; appellant Alderman to imprisonment for a term of three years and a fine of $5,000; and appellant Alderisio to imprisonment for a term of four and one-half years and a fine of $7,500.

The alleged conspiracy related to a certain oil transaction. According to the evidence of the prosecution, in June 1959 Robert Sunshine and others persuaded appellant Kolod to join them in an oil-lease investment in Nebraska. Kolod paid $78,150 in cash for a joint interest that was then owned by William H. Young, a consulting geologist and business associate of Sunshine. Ten thousand dollars

of Kolod's purchase money was paid directly to Young while the balance of $68,150 was turned over to Sunshine to be held in escrow pending transfer of warranted title and confirmation of current production. Kolod's interest was later divided equally between himself and appellant Alderman.

Kolod and Alderman did not receive any oil payments out of their investment until July 1960. In the meantime, Sunshine had invaded the escrow money to pay off encumbrances on the oil properties, and by October 1960 the escrow money was completely exhausted. During that month Kolod and Alderman visited Sunshine at his office in Denver to express their displeasure with the transaction. Sunshine was told that since he had given personal approval of the deal, he would be looked to for return of the full purchase price, either in a lump sum or in oil payments. Thereafter, in December 1960 and January 1961, Sunshine sent Kolod and Alderman the only additional oil run checks that were to come from actual production.

Throughout the spring of 1961 there were numerous long-distance telephone conversations between Kolod and Alderman in Las Vegas, Nevada and Sunshine in Denver relating to the cessation of oil payments and Kolod's and Alderman's demand for return of their invested money. According to Sunshine's testimony at the trial, these conversations included numerous threats by Kolod and Alderman to the effect that unless the money was returned promptly, Sunshine would receive a visit from "a lawyer" or "a Chicago lawyer" who would not be coming for the purpose of suing. Sunshine understood these remarks to mean that he would be killed if the money was not returned in full. The threatening nature of at least one of these long-distance conversations was verified by William Young who, at Sunshine's request, listened in on an extension telephone.

In a telephone conversation between Las Vegas and Denver on June 22, 1961, Kolod instructed Sunshine to

give the money to Kolod's nephew who would be attending a dentists' convention in nearby Boulder, Colorado. On June 28, Sunshine and Young met the nephew at the Denver Airport and reported that the money was not yet available. The nephew suggested that in view of Kolod's anger over the situation, Sunshine had better straighten out the matter immediately; whereupon Sunshine placed a call to Kolod from a pay station at the airport. The conversation was brief with Kolod responding that he would talk to Sunshine later. That evening Kolod called Sunshine to tell him that the matter had been discussed with Alderman and they had decided "to send a lawyer to take care of" him.

On July 6, 1961, appellant Felix Alderisio and Americo Di Pietto visited Sunshine at his office in Denver. Both men were from Chicago and unknown to Sunshine. Both had registered at Denver's Brown Palace Hotel where Alderisio used a fictitious name and address. Alderisio had known Kolod and Alderman for approximately ten years, and several weeks before the visit to Denver he had been a guest at the Desert Inn in Las Vegas where Kolod was an officer and stockholder. At that time, a check for $16,600 was issued to Alderisio by the Desert Inn after Kolod presented the hotel teller with cash in the same amount.

According to Sunshine, Alderisio introduced himself, sat down, and stated: "Ruby sent us. We came here to kill you." Di Pietto said nothing except to introduce himself as "Pete." Sunshine attempted to reason with the two men by demonstrating the legitimacy and his own good faith in the oil-lease transactions. After over an hour of discussion, Alderisio told Sunshine that only Kolod could save him. At Sunshine's suggestion, Alderisio placed a long-distance call from Sunshine's office to the Concord Hotel near Monticello, New York where Kolod and Alderman were then staying. When Sunshine was put on the telephone, Kolod told him that "he and Alderman had sent

Alderisio to let [Sunshine] know that there was no fooling around; that they meant business." Kolod then agreed to meet with Sunshine in Las Vegas to work out a final solution for repayment of the money. At the conclusion of the telephone conversation, Alderisio warned Sunshine of severe consequences if he failed to work out a settlement satisfactory to Kolod. Then, he and Di Pietto departed.

In August 1961, Sunshine and Young went to Las Vegas where Sunshine agreed to repay Kolod and Alderman the full $78,150 plus one-third "profit," less amounts already paid. Payments were to be made in monthly installments of approximately $2,000, and in the event actual oil runs were insufficient Sunshine himself was to make up the difference. Thereafter, some payments were made by Sunshine based upon fictitious oil run statements, but some of the checks were returned by the bank to Kolod and Alderman for insufficient funds.

In February 1962, in an interstate telephone conversation relating to the returned checks, Kolod told Sunshine that he might have to send Alderisio again. Then in the early summer of 1962, Kolod told Sunshine by telephone that he was leaving Las Vegas for a trip to Europe, that he would be seeing Alderisio enroute, and that he wanted to be able to tell Alderisio that all of the money had been returned. Sunshine, however, simply continued to send monthly installment checks. Later in the summer, Sunshine had a telephone conversation with Alderman who expressed the hope that the money be paid in full before Kolod's return to the United States so that Sunshine could avoid another visit from Alderisio. Shortly thereafter, Sunshine received a call from Kolod in New York who assured him that they still wanted back all of their investment plus the one-third profit. Sunshine advised Kolod that he was working on a sale of the oil interests so that the balance of their money could be paid in full. In the fall of 1962, Kolod called Sunshine again and gave him until the first of the year to pay up.

In December 1962, Sunshine went to Las Vegas and attempted to borrow money from Kolod. Later in the month, Sunshine was indicted for embezzlement of funds from a Dr. W. S. McClymonds of Denver, and all of his contacts with appellants Kolod, Alderman and Alderisio were terminated.

The trial was essentially a contest of credibility between Sunshine and his associates on the one hand and Kolod, Alderman, and Kolod's nephew on the other as to whether Sunshine was in fact threatened in interstate telephone conversations. Alderisio and Di Pietto did not testify. This consolidated appeal from the convictions of Kolod, Alderman, and Alderisio points to four rulings in the trial court which, appellants contend, constitute grounds for reversal. These are:

(1) the denial of an opportunity to present before the jury evidence that agents of the Federal Bureau of Investigation had placed a listening device in the executive conference room of the Desert Inn and had never heard Kolod threaten anyone over the telephones in that room;

(2) the denial of a motion by appellants Kolod and Alderman for severance of their trial from that of appellant Alderisio;

(3) the denial of appellants' request for an instruction to the jury that an actual agreement to transmit threats by interstate telephone is an essential element of the offense charged in the first count of the indictment; and

(4) the denial of appellant Alderisio's motions for judgment of acquittal.

For the reasons hereinafter stated, we find no error in these rulings or in any other aspect of the proceedings below. Accordingly, the judgments of conviction are affirmed.

I. The Proferred Evidence Relating to What the F.B.I. Overheard

Throughout the last nine months of the alleged conspiracy, from March 22 to the end of December 1962, agents of the Federal Bureau of Investigation monitored conversations originating in the conference room in the Desert Inn's executive office suite. This was effected through an arrangement between the F.B.I. and the Central Telephone Company of Las Vegas whereby a listening device located in the conference room was connected to telephone company service lines which in turn were connected to the F.B.I.'s Las Vegas office. The device was not a "wiretap," but simply a type of microphone that could pick up normal conversations. In the case of telephone conversations, only the voice of the person speaking from the Desert Inn could be heard.[1] The purpose of the device was to investigate certain suspect activities and associations by the Desert Inn ownership. The investigation was in no way related to the instant case, and in fact counsel for appellant Kolod was advised by Department of Justice officials prior to trial and long after the device was discovered and disconnected that no leads germane to this case were obtained from that source.

At the trial, appellant Kolod testified that many of his interstate telephone conversations with Sunshine, including

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[1] The procedure employed by the F.B.I. in monitoring the device was substantially as follows: Clerks in the office of the Bureau in Las Vegas would listen to loud speakers and record on log sheets any activity during the monitoring period. Whenever voices were heard, an entry would be made on the log sheet and a tape recorder immediately turned on. The tapes would then be given to the agent in charge of the Desert Inn investigation who within two days would review the recorded conversations and either make a summary of their contents or, if found appropriate, make a written transcription. Thereafter, the tapes would be erased and used again, and the log sheets and written reports would be filed in bound volumes.

those in the period March 1962 to December 1962, had been from the conference room of the Desert Inn's executive office suite. Then, for the stated purpose of directly corroborating Kolod's testimony that he had not threatened Sunshine, Kolod's counsel made a proffer that if he would be permitted to explore before the jury the fact that a listening device had been located in that room, he would show that agents of the F.B.I. had overheard many of the telephone conversations between Kolod and Sunshine and had never heard a single threat. After extended consultations out of the jury's presence, the trial judge rejected the proffer as a "fishing expedition," calculated to confuse and prejudice the jury with irrelevant and immaterial evidence against an agency of the government. The court also denied a defense motion for production of the F.B.I. records relating to the Desert Inn investigation, but agreed to inspect in camera the F.B.I. records available to government counsel to determine whether they contained any material which would support the credibility of the defendants' testimony. Upon conclusion of that inspection, the court found that there was absolutely nothing in the materials relating to any conversations between Kolod and Sunshine.

Appellants asserted below and have twice re-asserted in support of their appeal to this court that because of the tenuous thread of credibility upon which the government's case depends, the negative evidence of what the F.B.I. did or did not overhear should have been sent to the jury.

On January 27, 1966, prior to the initial appellate arguments in this case, counsel for the government advised this court that he had learned for the first time of the existence of additional files related to the F.B.I.'s Desert Inn investigation. While it was stated that the files contained no information affecting the pending appeal, counsel requested "an Order that the District Court examine these additional files and the files previously furnished and make such

findings and enter such order as justice requires." On May 12, 1966, after the initial appellate arguments, this court ordered a limited remand with directions to the trial court to (a) examine in camera the additional files of the government and (b) allow appellants to call as witnesses such government agents and employees as were included within the proffer of proof and examine the same under the rules of evidence as to their subjective knowledge of the telephone calls. The trial court was further directed that if after such examination and hearing the appellants had established the relevancy of their proffered evidence, an order should be entered for such relief as might be proper under the circumstances.

In granting the limited remand this court stated in its order:

> "The original government files . . . were submitted to the trial court for in camera inspection in conjunction with a proffer of proof made by appellants during the course of the trial and purportedly constituted a partial record of mechanically intercepted phone calls made between Las Vegas, Nevada and Denver, Colorado. Appellants as part of their proffer of proof also sought to call as witnesses certain agents and employees of the government who might have knowledge of the substance of such intercepted phone calls that did not reflect in the government files. The proffer of proof was rejected by order of the trial court and such ruling is now asserted to be trial error of a prejudicial nature.
>
> "Usually it is incumbent upon a party who makes a proffer of proof to show the relevancy of such proof as a premise to the proffer. Appellants made no such showing in the case at bar but were unable to do so because knowledge of the contents of the government files and knowledge of what additional subjective information the government agents had or did not have

> was peculiarly that of the government and not known to appellants. Under these special circumstances, failure of appellants to show the relevancy of the agents' testimony was not fatal to the proffer."

In substance we then concluded that appellants had a right to pursue the possibility that the F.B.I. agents had subjective knowledge of the substance of phone calls made and overheard from the Desert Inn which would substantiate their claim that they had not threatened Sunshine. If, in fact, the agents had listened to Kolod-Sunshine calls and recalled no threats, the testimony would clearly be probative and proper for jury consideration.

Pursuant to our remand, the trial court examined over seven hundred numbered pages of F.B.I. logs which covered each day, from March 22, 1962 to August 14, 1963, when the listening device was operative in the executive office suite of the Desert Inn. The trial court also heard the testimony of ten persons called as witnesses by defense counsel.[2] All of these persons had been associated with the F.B.I.'s Las Vegas office and its investigation of the owners of the Desert Inn during the period in question.

The logs and a complete transcript of the hearings have now been included in the appellate record. Their contents may be summarized as follows: In none of the materials does it appear that a single telephone call was ever made or received by appellant Kolod in the executive office suite of the Desert Inn. Further, although the materials show that Kolod's name was mentioned several times by other persons, on only two or three occasions between March 22, 1962 and August 14, 1963 does it appear that Kolod was even present in the room where the listening device was

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[2] Approximately ten additional witnesses were made available by the government but were not called because of a stipulation that their testimony would be much the same as those who were called.

located; and on none of those occasions was he talking on the telephone. With respect to the F.B.I. agents called as witnesses by defense counsel at the hearing, not one of them testified to a subjective knowledge of any telephone calls made or received by Kolod. Accordingly, the potential relevancy of the agents' testimony was not established and, to the contrary, it became apparent that Kolod's credibility would be negatived by such testimony. Kolod testified that he used a certain phone; the agents' testimony established only that they overheard no such telephone conversations. Such a nebulous conflict had no probative value in the trial issues and obviously would lead to a dramatic but immaterial diversion to a side issue if submitted to the jury. Appellants failed to establish the relevancy of their proffer, and their request to have this evidence submitted to a jury was properly denied. See Lujan v. United States, 10 Cir., 209 F. 2d 190, 194.

Appellants now contend that under the authority of at least two Supreme Court cases and the Fourth Amendment to the United States Constitution, they should have been permitted to inspect the F.B.I. logs that were examined in camera by the trial court and use them in "cross-examination" of the F.B.I. agents. We can find no merit to this contention.

First, because some of the witnesses at the hearing testified that they had consulted the logs to refresh their memories shortly before coming into court, appellants state that those logs should have been turned over to the defense on proper motion under the rule of Jencks v. United States, 353 U.S. 657, and 18 U.S.C. § 3500. We need only cite the distinction made by the trial court: The *Jencks* rule was directed to written evidence referred to by prosecution witnesses; here the witnesses were called to testify in behalf of the defense. Further, *Jencks* was designed to prevent a holding back of evidence relating to the prosecution's case; here, as already demonstrated, the evidence was unrelated to the prosecution.

Next, appellants refer to Dennis v. United States, 384 U.S. 855, 868-75, where it was held that the defense is entitled to inspect grand jury minutes before completion of the cross-examination of prosecution witnesses. We reemphasize that the F.B.I. agents called to testify in the instant case were defense, not prosecution, witnesses. Thus, the questioning of these agents by defense counsel was direct, not cross, examination. Further, it is manifest that one cannot draw a reasonable comparison between the irrelevant proffer made here and the facts in *Dennis*. We note incidentally that all grand jury minutes requested at the trial of this case, a trial that occurred over a year before the *Dennis* decision, were in fact furnished to defense counsel for use in cross-examination of the government's witnesses.

Finally, appellants suggest that the F.B.I. logs are tangible fruits of an unlawful invasion of privacy and, accordingly, must be returned to the persons whose voices are represented in the summaries and transcriptions. While the legality of such a method of investigation by a law enforcement agency is not presently before us, if we assume without deciding that appellants are correct in their novel contention, they nevertheless are not entitled to this evidence because, on the basis of in camera inspection by both the trial court and this court, there is nothing summarized or transcribed therein which purports to reflect any statement by any appellant. There is, in conclusion, simply no support in law or fact for the proposition that these appellants should have access to these government documents.

II. The Motion To Sever the Trial of Alderisio From the Trial of Kolod and Alderman.

During the trial, after the government had presented its case in chief and after co-defendants Kolod and Alderman had testified in their own behalf, Alderman's counsel moved orally in a chambers conference for severance of the trial

of co-defendant Alderisio. As stated to the trial court, the grounds for the motion were (1) that as a co-defendant Alderisio had chosen to exercise his right not to testify but he was needed as a defense witness to exculpate Kolod and Alderman from any association with his and Di Pietto's July 6, 1961 visit to Sunshine's office in Denver, and (2) that under the authority of De Luna v. United States, 5 Cir., 308 F. 2d 140, *rehearing denied,* 324 F. 2d 375, if Alderisio were called to testify and he declined, counsel for Kolod and Alderman wanted to be able to comment to the jury about it without causing a mistrial. A third ground that apparently is raised for the first time on appeal is that Alderisio's refusal to take the witness stand was made known to counsel for the other co-defendants only after the government's case was complete. Our consideration of these contentions must reflect the premise that disposition of a motion for severance is a matter within the discretion of the trial court, and will not be set aside upon appeal unless it clearly appears that appellants did not receive a fair trial as a result of the denial of their motion. Baker v. United States, 10 Cir., 329 F. 2d 786, 787.

In conjunction with the first ground for the motion, appellant Alderisio filed with the trial court an affidavit stating that appellants Kolod and Alderman had nothing to do with his visit to Sunshine's office, that he was prepared to testify to the matter, but that after giving such testimony he would be compelled to invoke the protection of the Fifth Amendment and thus greatly impair his own right to trial by a fair and impartial jury. The affidavit concluded:

> "[Y]our affiant will refuse to testify on behalf of Kolod and Alderman in any trial in which he is also a defendant on the grounds that such testimony would deprive your affiant of the fair trial guaranteed him by the Constitution of the United States."

Significantly, the affidavit was couched in terms which indicated that Alderisio intended to invoke his constitu-

tional privilege against self-incrimination whether he testified as a co-defendant or as a severed defense witness. Had the government attempted to present culpatory evidence from a witness who would refuse defense cross examination upon other than a collateral matter, it would have been appropriate to order the direct testimony stricken. United States v. Cardillo, 2 Cir., 316 F. 2d 606, 613-14; Montgomery v. United States, 5 Cir., 203 F. 2d 887, 890-91. The case at bar presents the counter problem used as a sudden instrument to present the trial court with apparently impossible alternatives. In such case the law recognizes that timeliness of presentation, totally lacking here, is a proper and prime factor in determining an accused's rights in the orderly conduct of a trial. Further, even if we ignore the clear import of the affidavit, the trial court could not be forced into the position of having to speculate on whether Alderisio would be more willing to waive his constitutional privilege if and when called as a severed defense witness than he was if and when called as a co-defendant. Gorin v. United States, 1 Cir., 313 F. 2d 641, 645-46. The facts here therefore are plainly distinguishable from United States v. Echeles, 7 Cir., 352 F. 2d 892, where the pre-trial motion for a severance declared that if the co-defendant to be used as an exculpatory witness were tried first, he would not invoke the Fifth Amendment when subsequently called to testify in a separate trial.

Appellants' second ground in support of their motion for severance is similarly unconvincing. Much reliance is placed upon the *De Luna* case, *supra*, where the Fifth Circuit stated:

> "If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately.
>
> • • •
>
> "[A defendant's] right to confrontation allows him to invoke every inference from [a co-defendant's] absence from the stand." 308 F. 2d at 141, 143.

The court went on to recognize the conflicting basic right of an accused to be free from prejudicial comments about his failure to testify, and concluded that severance of the co-defendants was the only fair solution. The important factual distinction between *De Luna* and the instant case, however, is that in the former, one co-defendant successfully shifted all of the blame to the other co-defendant, whereas here, all co-defendants put forth a single, unified defense based on the theory that the prosecution witnesses had fabricated a preposterous story against them. Kolod and Alderman never alluded to any possible individual guilt on the part of Alderisio, and therefore no benefit could possibly have been derived from commenting to the jury about Alderisio's failure to testify. Hayes v. United States, 8 Cir., 329 F. 2d 209, 221-22. Additionally, in *De Luna* the motion for severance was made prior to trial and the relationship between co-defendants, as well as between their respective counsel, was at all times a very antagonistic one. Neither of these circumstances appears in the case at bar. The facts of *De Luna* do not compel a rule of constitutional dilemma expanding, as appellants would have us hold, to the generality that the right of a testifying defendant to comment on the failure of a co-defendant to testify is absolute, as is the non-testifying defendant's right to be free of such comment. Such a rule, as Judge Bell specially concurring in *De Luna* states, "would eliminate joint trials, or vest in a defendant the right to a mistrial during final arguments, or in the alternative create built-in reversible error, all in the discretion of the defendants." 308 F. 2d at 157.

In denying the motion for severance, the trial court concluded:

> "I do not think it proper at this time to make a severance because from the discussion we have had this afternoon on this matter it is clear to the Court that counsel have known about this situation at least for

> some time prior to the commencement of the trial of this case and it could have then very well been brought to the Court's attention, rather than do it in the middle of a trial and then make some assertions as to the overall desirability of a fair trial for all the parties and so forth."

The "discussion" that the court was referring to included at least two direct invitations to defense counsel, one by the court and one by a government attorney, to state categorically whether they had learned for the first time of Alderisio's election not to testify only after the government's case was complete. Neither invitation was accepted, at least not by direct reply. Then when the court formally denied the motion for severance on the principal ground of timeliness, defense counsel failed to object. Now, as appellants, they assert that Alderisio's refusal to testify was in fact brought to the attention of Kolod's and Alderman's counsel for the first time "immediately before they made their motion," and that this confronted them with an unexpected "gap" in their defense strategy. Inasmuch as it has already been shown that the motion for severance was wanting in substantive merit, we have little sympathy for what appellants now assert as a procedural problem. Whatever the procedural difficulties that may have militated against them as a result of Alderisio's refusal to testify, we are inclined to believe that those difficulties are of appellants', not the trial court's, own doing. We therefore find no abuse of the trial court's discretion in denying the motion for severance.

III. The Requested Instruction.

At the conclusion of arguments to the jury, appellants tendered, and the trial judge refused, the following instruction:

> "Count I charges that these Defendants conspired, or, in words, agreed together, to accomplish a particular

> purpose: the making of threatening interstate telephone calls to Robert Sunshine. A person cannot agree to a purpose unless he knows what that purpose is. Thus, as to each Defendant, you must be convinced beyond a reasonable doubt that he knew, understood, and desired that a threatening interstate call or calls would be made. If you cannot make this finding as to any Defendant, you must acquit him on Count I."

Being mindful of the principle that no error will be found in failure to give a requested instruction if the legal subject matter of the request is in fact covered in the trial court's general instructions, appellants assert that, as given, the general instructions failed to apprise the jury of an essential element of the offense charged in the first count of the indictment, *i.e.*, the element of an agreement to use interstate telephone communications. Appellants submit that the jury, under the instructions it received, could have convicted them not only on the theory of threatening communications by interstate telephone, but also on the theory that two of them (Kolod and Alderman) sent a threatening communication through the third (Alderisio) by interstate travel. In essence, the complaint is that the jury was not made to focus upon the particular form of interstate transmission charged under 18 U.S.C. § 875(c).[3]

A careful reading of the trial judge's instructions to the jury reveals a commendably thorough and definitive exposition of the statutes and charges involved. Logically, inasmuch as both counts of the indictment charged interstate transmission of threats by telephone, the court de-

---

[3] 18 U.S.C. § 875(c), one of the statutes under which appellants were convicted, reads as follows:

> "Whoever transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

layed until conclusion of a full discussion of the applicable statutes to state:

> "[T]he transmission of a telephonic conversation by telephone wires from one state to another state constitutes transmission in interstate commerce of a communication within the meaning of the *statute* upon which the indictment in this case is based." (Emphasis added.)

Although they implicitly agree that this portion of the general instructions covers the legal import of their requested instruction, appellants urge that use of the word "statute" in the singular, plus the location of this one reference to telephone communications far removed from the specific instructions on Count One of the indictment, would lead the jury to believe that Count One related to an agreement to transmit threats in interstate commerce by any means, telephone or otherwise.

While the diligence of appellate counsel in presenting this issue is impressive,[4] we cannot agree that either the form or format of these general instructions represent reversible error. First, since each count of the indictment rested upon a common section, albeit different sub-sections, of Title 18 of the U.S. Code, and since each sub-section employed identical phraseology in defining the federal crimes charged, the use of the singular noun "statute" in referring to interstate communications by telephone was both understandable and proper. Second, the government's entire case was built around telephone communications. Nothing in the record would suggest that either the court,

---

[4] Although absence of an instruction on an essential element of the offense charged may be "clear error" under Fed. R. Crim. P. 52(b), we note that defense counsel never objected at the trial to any particular aspect of the general instructions as such, but merely reiterated their general objection to the trial judge's refusal to include their requested instruction. See Fed. R. Crim. P. 30.

the jury, the government, or the defense ever had anything but telephone communications in mind. Indeed, there is nothing in the record that would support a conviction for threatening communications by any means except the telephone. The general instructions given were, on the whole, exhaustive and completely fair. Accordingly, we reject the speculation of appellants that the jury might have been in some way misled into convicting them for a crime other than that charged in the indictment.

IV. Alderisio's Motion for Acquittal

On two occasions during the trial, first at the conclusion of the government's case and then at the conclusion of the presentation by the defense, appellant Alderisio moved for judgment of acquittal. Both motions were summarily denied by the trial court. Alderisio contends in this appeal that he was entitled to acquittal as a matter of law on the ground that the record evidence failed to connect him with the federal element of the offense for which appellants Kolod and Alderman were convicted, *i.e.*, the agreement to use interstate communication facilities for the unlawful purpose of making threats. Without proof of his complicity in the interstate nature of the threats, it is urged, there is no support for Alderisio's conviction for a federal crime.

Where federal criminal jurisdiction is based upon the presence of an interstate transaction or occurrence, it is necessary only that the evidence provide an inference that the defendant could have reasonably anticipated the interstate ramifications of his wrongful conduct or the wrongful conduct of those with whom he has associated. See, *e.g.*, Pereira v. United States, 347 U.S. 1; United States v. Kierschke, 6 Cir., 315 F. 2d 315, and authorities cited therein. In the instant case, however, the inferences from the record far transcend the realm of Alderisio's mere reasonable anticipation. As the very instrument of force

by which Kolod and Alderman had persistently assured Sunshine they would carry out their threats, Alderisio was an essential element of the conspiracy. His brief reign of terror in Sunshine's office, coupled with his initiation of an interstate telephone call to Kolod and Alderman in Monticello, New York, was a clear indication of his active participation in and knowledge of the agreement to transmit threats from one state to another. The motions in Alderisio's behalf for judgment of acquittal were properly denied.

AFFIRMED.

Judgments

Twenty-Second Day, January Term, Friday, February 3rd, 1967

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

No. 8268

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Ruby Kolod, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

No. 8269

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Willie Israel Alderman, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

No. 8270

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Felix Antonio Alderisio, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

By order of February 10, 1967, an extension to February 23, 1967, was granted in which to file a petition for rehearing.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 133

RUBY KOLOD, WILLIE ISRAEL ALDERMAN AND FELIX ANTONIO ALDERISIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 371 F. 2d 983.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1967. A petition for rehearing was denied on March 8, 1967. On March 22, 1967,

Mr. Justice White extended the time for filing a petition for a writ of certiorari to May 7, 1967. The petition was filed on May 5. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court, after an *in camera* inspection of the records of eavesdropping by government agents, properly ruled that the government had not suppressed any exculpatory evidence.

2. Whether the trial court, acting pursuant to a limited remand by the court of appeals, properly confined the hearing to issues within the scope of the remand order.

3. Whether the court's instructions failed to apprise the jury of an essential element of the offense charged.

4. Whether the court of appeals, in finding the evidence sufficient to support the conviction of petitioner Alderisio, improperly considered evidence presented by a co-defendant.

STATEMENT

Petitioners were convicted in the United States District Court for the District of Colorado of conspiracy to transmit in interstate commerce communications containing threats to injure and murder one Robert Sunshine in violation of 18 U.S.C. 875(c). It was alleged that between May 15, 1961, and July 6, 1961, eight overt acts were commited in furtherance of the conspiracy. Kolod was sentenced to imprison-

ment for four years and fined $7,500; Alderman was sentenced to three years and fined $5,000; and Alderisio was sentenced to four and one-half years and fined $7,500.

1. The sufficiency of the evidence to prove a conspiracy to transmit threatening communications is not challenged here, although Alderisio raises a question as to the evidence relating to him. In brief, the evidence shows that in June 1959 petitioner Kolod, an officer of the Desert Inn in Las Vegas, and petitioner Alderman invested $78,150 in an oil lease venture with Robert Sunshine, a Denver attorney (1 R. 25-30).[1] In October 1960, Kolod and Alderman voiced displeasure with the transaction. Alderman told Sunshine that if he did not get his money back in full he would collect it without resort to "normal collection methods" (1 R. 38-39).

In the spring of 1961 there was a series of long-distance telephone conversations from Kolod and Alderman in Las Vegas to Sunshine in Denver about the invested money. In these calls, Kolod inquired whether Sunshine was aware of Alderman's background and said that he was fearful of what might happen to Sunshine if the matter was not resolved (1 R. 41, 45-46). On May 11, 1961, Alderman told Sunshine that "he was going to send a lawyer" to see him unless the matter was settled (1 R. 47-48). On May 16, a check for $16,600 was issued to Alderisio

[1] "R." refers to the transcript of the trial proceedings. "Tr." refers to the hearing held after the case was remanded by the court of appeals.

by the Desert Inn in exchange for cash presented by Kolod (2 R. 353-354). The next day Kolod imposed a 30-day deadline on the return of the $78,150 (1 R. 49). An extension was refused. In a conversation in June both Kolod and Alderman told Sunshine that a "lawyer from Chicago" would take care of him and would not be there for the purpose of filing a lawsuit (1 R. 52-53).

On July 6, 1961, petitioner Alderisio and Americo DePietto visited Sunshine in his Denver office. Alderisio said, "Ruby sent us. We came here to kill you," and boasted that he could easily kill Sunshine or a member of his family. Sunshine persuaded Alderisio to listen to his side of the transaction. Kolod, who was reached by telephone in New York, agreed to meet with Sunshine in Las Vegas, but warned Sunshine that if Alderisio returned he "would simply take care of the job." Alderisio reiterated this warning (1 R. 56-59, 69). In August 1961, Sunshine agreed to repay Kolod and Alderman in installments. Pursuant to this agreement, a series of checks was sent to Kolod and Alderman (1 R. 60, 62-68; 2 R. 206). In February 1962, in the course of an interstate telephone conversation relating to some checks returned for insufficient funds, Kolod warned Sunshine that he might have to send Alderisio again (1 R. 71).

In the spring or early summer of 1962, Kolod told Sunshine in a telephone conversation that, before he went on a trip to Europe, he wanted to tell Alderisio that the money had been paid. Later, Alderman told

Sunshine that he could avoid another visit from Alderisio if he paid the money before Kolod returned from Europe. In the early fall of 1962, Kolod telephoned from New York and repeated that they wanted their money back plus a one-third profit. Shortly thereafter, Kolod called again and gave Sunshine until the first of the year to pay up in full (1 R. 71-72, 160-163). In December 1962, after embezzling funds from his clients, Sunshine traveled to Las Vegas where he unsuccessfully attempted to borrow money from Kolod (1 R. 72-73).

2. Alderman and Kolod testified in their own defense. Alderman denied that he had threatened Sunshine (3 R. 440, 446), saying that his telephone conversations with Sunshine in 1961 had been innocuous (3 R. 442, 456, 461-462) and that he had had no telephone conversations with him in 1962 (3 R. 444-445). Kolod denied that he had threatened Sunshine (2 R. 328). He said that he usually talked to Sunshine after a check was returned unpaid. He testified that in 1961 and 1962 his conversations with Sunshine were conducted over the telephone in the executive office of the Desert Inn (2 R. 328).

After Kolod testified, petitioners called as a witness a private detective who had investigated the Desert Inn executive office in August 1963. When the government objected, petitioners, relying upon *Brady* v. *Maryland*, 373 U.S. 83, offered to prove that a listening device installed in this room between March 22, 1962, and August 1963 had carried every conversation to F.B.I. headquarters, and argued that

the F.B.I. thus had information showing that Kolod had never threatened Sunshine over this telephone (3 R. 403-417).[3] The government replied that it had no record of any overheard conversations between Kolod and Sunshine. Petitioners claimed that this created an issue of credibility for the jury as to what conversations were recorded and that they were entitled to a full hearing on the subject of whether the agents had heard any conversations in which Mr. Kolod was involved in the conference room (3 R. 428-429). The trial judge ruled that testimony about the listening device was irrelevant unless the government files contained something that would either establish the innocence of the defendants or affect the credibility of Sunshine (3 R. 429-430). The court then inspected the files and found no reference to conversations between Kolod and Sunshine and "no reference to the matter on trial" (3 R. 479). Petitioners contended that the absence of anything in the files "demonstrates that there were no threatening calls made over the telephone from that office" and "demonstrates exculpation here on the part of the defendant Kolod who used the telephone" (3 R. 481). Their request for a hearing on a proffer of proof (3 R. 412-418, Pet. 6-7) was denied.

While the case was on appeal, the government informed the court that it had discovered additional files relating to conversations overheard at the Desert Inn. The case was remanded with directions that

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[3] Counsel for Kolod in his proffer accepted the representation by the government that no leads germane to this case were obtained by the eavesdropping (3 R. 407).

the district court examine the additional files *in camera* and allow petitioners to examine the agents referred to in the proffer of proof who had heard the listening device.

The hearing on remand disclosed that the device, located in an office occupied by two men, not defendants in this case (4 Tr. 65), had been installed as part of an investigation into "skimming activities" (money taken from the hotel to avoid the payment of taxes), the names of recipients of money from the hotel and the business contacts of the owners of the hotel (4 Tr. 55-56; 2 Tr. 13-14). The monitoring itself, by 21 monitors, took place at the F.B.I. office in Las Vegas, the sound coming over a single leased line running from the Desert Inn (2 Tr. 8, 11, 21-22; 3 Tr. 8). If voices were heard, a notation would be made in an administrative log showing the type of information received. In addition, a recorder would be turned on to record each pertinent conversation (2 Tr. 12-13, 59, 62; 3 Tr. 12-13, 42-45, 49-51).[3] Later, the special agent assigned to the case would listen to the recorded conversation. He would also examine the administrative log and transcribe all pertinent information "other than conversation about dates or showgirls or golf matches and so forth" (2 Tr. 12, 24-25, 35; 4 Tr. 66).[4] The tape recordings would

---

[3] On some occasions, one individual would monitor more than one line. If a voice were heard over another line, the recorder would be turned on (see, *e.g.*, 3 Tr. 54-55).

[4] Originally the trial judge had been given the complete information as transcribed by the case agent but had not been furnished the administrative logs (2 Tr. 27-28).

then be erased (2 Tr. 23). The monitors of the listening devices had been given the names of individuals, including Kolod, who were of particular interest to the investigation, and they were instructed "to enter everything on the log that occurred in that room" (4 Tr. 84; 2 Tr. 37; 3 Tr. 67). Under these instructions, they would have recorded or logged any conversation of Kolod and any conversation involving money, returned checks, oil deals or unknown persons (3 Tr. 44-45, 63-66, 80-81, 115; 4 Tr. 32, 63-64). None of the monitors heard Kolod speak over the telephone, although on several occasions his voice was heard in the office where the listening device was located (2 Tr. 37-38; 4 Tr. 65, 71, 81, 92-93).[5]

At the conclusion of the hearing, the trial judge, who had examined the additional files, found that neither the material nor the subjective knowledge of any of the witnesses who testified showed that Kolod had talked over the telephone in the room involved (5 Tr. 13-18).

ARGUMENT

1. As set forth in the Statement, *supra*, the government's evidence showed that as early as the fall of 1960 petitioners Alderman and Kolod had told Sunshine that they wanted their money back and would not rest content with ordinary methods for its

[5] Kolod's function at the hotel was described as the manager of the casino, which was located in a section of the hotel away from the office with the listening device (4 Tr. 60-61, 71, 73, 87-89).

collection. In May and June 1961 they said they were going to "send a lawyer" to collect. In July 1961, Alderisio visited Sunshine and threatened to kill him. In August 1961 Sunshine agreed to make payments; a total of sixty-six checks thereafter sent were introduced in evidence. In 1962 Kolod, who was in Europe during the summer, called Sunshine several times in the spring (according to Kolod, from Las Vegas), saying that he wanted his money in full before he went to Europe, and again in the fall saying that he wanted his money back in full by the end of the year (1 R. 71-72, 160-161, 162).

The proffer of proof and the records of eavesdropping here in issue concern only the period from March 22 to December 19, 1962.* This was a small and by no means crucial period of the conspiracy. The evidence that the F.B.I. agents had heard no threatening calls from Kolod to Sunshine during this period was properly withheld from the jury, since its relevancy was not established. There was no proof that the agents overheard *any* calls from Kolod to Sunshine, and in the absence of such evidence their testimony that they had heard no threats was obviously not germane. If anything, the evidence of the eavesdropping undermined Kolod's claim that he had made calls during the period in question from the monitored office, not Sunshine's claim that he had received threatening calls from Kolod during this period, since Sunshine did not testify, and could not

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* Sunshine testified that he had not spoken to Kolod after December 19, 1962 (1 R. 159).

know, where the calls were coming from. Accordingly, the question of relevancy—which was clearly one for the court to decide even if it involved preliminary factual determinations (cf. *Carbo* v. *United States*, 314 F.2d 718, 736 (C.A. 9), certiorari denied, *sub nom. Palermo* v. *United States*, 377 U.S. 953)—was properly resolved against petitioners.

Nor was there any unfairness in the procedure adopted for making the determination whether the evidence of eavesdropping would be relevant. The trial court did not simply accept the prosecutor's statement that government agents had not overheard any Kolod-Sunshine conversations. It conducted an independent examination of the government files which summarized and recorded what was overheard, and it found no indication of any telephone conversations between Kolod and Sunshine and indeed no material which related in any way to the matter on trial. The court of appeals, in remanding the case, was not satisfied with that determination; it concluded that appellants had a right to pursue the possibility that the F.B.I. agents had subjective knowledge of the substance of telephone calls made by Kolod (Pet. 10a). The hearing on the motion to remand showed that the agents knew of no Kolod-Sunshine conversations either from objective recordation or from their own recollection. Thus the court properly ruled that the agents had no relevant testimony to offer the jury.

The claim that petitioners were entitled to see the files in order to cross-examine the government agents (Pet. 16-18) is without merit in the circumstances.

Petitioners were claiming that the government was suppressing relevant evidence favorable to the defense. The mere assertion of such a claim does not require that government files be opened up to the defense. The situation may be likened to a dispute over whether material relates to the case on trial within the meaning of 18 U.S.C. 3500. In order to preserve the secrecy of unrelated government files the trial court may properly determine that issue by an *in camera* inspection of the government files. Otherwise, every charge that the government was suppressing relevant material—however insubstantial—would result in sweeping and unjustified disclosure of the contents of confidential governmental files.

Neither *Dennis* v. *United States*, 384 U.S. 855, nor *Jencks* v. *United States*, 353 U.S. 657, is in point; each involved the question whether to disclose to the defense concededly relevant materials. As for the claimed property interest of Kolod in the government's files, surely he has no right to conversations in which he did not participate. Finally, unlike *Black* v. *United States*, 385 U.S. 26, and the cases which have followed it, there is no contention in this case that the government's case is tainted by illegal evidence.

2. Near the close of the hearing on remand, defense counsel asked an agent whether the F.B.I. had "employed any wire tap, listening device, or eavesdropping device in connection with Phil Alderisio at either Hillcrest 7-0664 or Harrison 7-1700." When the government objected that this question was beyond the scope of any activities at the Desert Inn, defense

counsel replied that they were attempting to show that there was a wire tap or listening device on Alderisio during the period of time at issue and that this was "newly discovered". They argued that the government had the burden of disclosing to the court and counsel whether there was a "bug" during this period. The court sustained the objection as being beyond the purpose of the inquiry concerning what had occurred at Las Vegas (4 Tr. 98-99). The court and government counsel acted properly in confining the issue to the inquiry for which the case was remanded. Defense counsel's assertion that he had newly discovered evidence, without specifying any details, did not warrant broadening the hearing to matters not included in the remand.

3. Petitioners contend that the instructions failed to require the jury to find that they conspired and agreed to transmit telephone threats in interstate commerce. An examination of the instructions, however, shows that the jury was adequately charged on this issue. Initially, the jury was instructed that the conspiracy charged was that "the defendants conspired to transmit in interstate commerce threats to injure and murder one Robert Sunshine" in violation of 18 U.S.C. 875(c) (3 R. 493). Thereafter, the court read to the jury the conspiracy statute and 18 U.S.C. 875(c), which makes it a crime to transmit any communication in commerce containing any threat. The court then instructed the jury on the law of conspiracy, setting forth the elements of the offense which they had to find (4 R. 495-496). The court

then instructed on the second count of the indictment. Following this the court told the jury that the transmission of a telephone conversation from one state to another is a communication "within the meaning of the statute upon which the indictment in this case is based" (4 R. 498). As the court of appeals found, nothing in the record suggests that anyone at the trial "had anything but telephone communications in mind" (Pet. 19a). If defense counsel thought that under the instructions the jurors might have convicted defendants of a conspiracy to threaten by interstate travel (Pet. 20), they should have called that possibility to the attention of the trial judge (3 R. 503).

4. Petitioner Alderisio's attempt to transform an attack on the sufficiency of the evidence into a question of law (Pet. 21-23) is without merit. On the government's evidence alone, the evidence was ample to justify the conclusion that Alderisio was aware of the fact that interstate telephone facilities had been and would be used by the other petitioners, who were in Nevada, to make threats to Sunshine, who was in Denver. See *Pereira* v. *United States*, 347 U.S. 1.

The court of appeals did not, as petitioner Alderisio contends, affirm his conviction on the basis of evidence introduced by a co-defendant. Rather, it based its conclusion on facts in the government's case when it stated (Pet. 19a-20a):

> * * * As the very instrument of force by which Kolod and Alderman had persistently assured Sunshine they would carry out their threats, Alderisio was an essential element of the con-

> spiracy. His brief reign of terror in Sunshine's office, coupled with his initiation of an interstate telephone call to Kolod and Alderman in Monticello, New York, was a clear indication of his active participation in and knowledge of the agreement to transmit threats from one state to another. * * *

The other parts of the opinion to which petitioners refer (Pet. 13) are from the court's general statement of the case, not its review of the sufficiency of the evidence to sustain Alderisio's conviction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1967.

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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 133

RUBY KOLOD, WILLIE ISRAEL ALDERMAN, and FELIX ANTONIO ALDERISIO, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR REHEARING AND MOTION FOR DISCLOSURE OF ELECTRONIC SURVEILLANCE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 133

RUBY KOLOD, WILLIE ISRAEL ALDERMAN, and FELIX ANTONIO ALDERISIO, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR REHEARING AND MOTION FOR DISCLOSURE OF ELECTRONIC SURVEILLANCE

Petitioners pray that this Court grant rehearing of its order of October 9, 1967, denying the petition for a writ of certiorari, and that a writ of certiorari issue on questions 1 and 2 presented in the petition, and on the following additional question:

> Whether, when the Department of Justice has in its possession recordings of a criminal defendant's voice obtained through electronic surveillance, the Department may refuse unqualifiedly to disclose

> the existence and contents of those recordings unless in its untrammelled discretion, free from judicial control, it determines *both* that the surveillance "is or may be unlawful" *and* "that the government has thereby obtained any information which is arguably relevant to the litigation involved."

In the alternative, petitioners request that the Court order the Solicitor General to file a memorandum containing such information as was required by the Court's order in *Black* v. *United States,* 384 U.S. 983 (1966), and that the Court, pending receipt of the memorandum, hold in abeyance its determination of this petition.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The intervening circumstance which warrants rehearing is the Department of Justice insistence, in the exchange of memoranda concerning petitioners' application for an order suspending the effect of the denial of certiorari, upon its right to refuse disclosure of electronic surveillance in its discretion, rather than under judicial control. For the information of the full Court, the following are attached as appendices to this petition: "Application For An Order Under Rule 25(2) Suspending The Order Of Denial Of Certiorari Pending Filing Of A Petition For Rehearing," attached as Appendix A; the Acting Solicitor General's "Response To Application For An Order Under Rule 25(2) Suspending The Denial Of Certiorari Pending Filing Of A Petition For Rehearing," attached as Appendix B; "Reply Memorandum Re Application For An Order Suspending The Order Of Denial Of Certiorari," attached as Appendix C; and, Mr. Justice White's Order of October 17, 1967, suspending the

effect of the order of denial of certiorari, attached as Appendix D.

A review of the events since denial of certiorari, as reflected in the appended pleadings, reveals the following: After the petition for certiorari was filed, counsel received information justifying a belief that in the course of electronic surveillance conducted by a government agency, probably the FBI, the voice of petitioner Alderisio had been overheard. The application for an order suspending the denial of certiorari stated this belief, and contained a request that the Department of Justice make a statement on the matter of surveillance. The application also recited that the Acting Solicitor General had undertaken to look into possible electronic surveillance. The Acting Solicitor General made his inquiries, and then filed a reply opposing suspension of the denial of certiorari. This truly extraordinary reply, Appendix B to this petition, summarized the events leading to its filing, and then set out the Department's view that it was not required in this or any other case to disclose the existence of illegal electronic surveillance unless it made a preliminary "relevance" determination. This statement, as we argue below, presents for this Court's consideration questions analogous to those presented by claims of privilege, see, *e.g., United States* v. *Reynolds,* 345 U.S. 1 (1953), by demands for Jencks Act statements, see *Campbell* v. *United States,* 365 U.S. 85 (1961), and by motions for grand jury minutes, see *Dennis* v. *United States,* 384 U.S. 855 (1966). In those cases, this Court has firmly declined to make the executive branch rather than the courts the final arbiter on questions of producing government records for use in litigation to which the government is a party.

Petitioners filed a reply to the Solicitor General's pleading and, on October 17, Mr. Justice White granted the petitioners' application. Petitioners remain free on bond pending disposition of this petition.

Petitioners submit that this case presents an urgent need for exercise of the Court's supervisory power over federal criminal justice, including an order setting out the conditions under which electronic surveillance should be disclosed under judicial supervision in all federal criminal cases, and granting petitioners an opportunity to ensure, through adversary litigation, that their prosecutions are free of all taint from illegal surveillance. The discussion below analyzes the Department's position in this case, suggests means consistent with the past decisions of this Court for dealing with disclosure of surveillance, and, finally, discusses the relief which should be granted at this stage.

The Department of Justice Position

The Department of Justice, through the Acting Solicitor General, has said that its policy is:

> "to make disclosure if it finds (1) that there has been an electronic surveillance which is or may be unlawful, and (2) that the government has thereby obtained information which is arguably relevant to the litigation involved." Appendix B, *infra*.[1]

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[1] This policy is a restatement of that set out in Supplemental Memorandum for the United States, *Schipani* v. *United States*, No. 504, October Term 1966, p. 5. It apparently represents the Department's attitude toward trial and appellate courts, including this Court. The number of cases in this Court alone in which illegal surveillance has been conceded should indicate that this policy has substantial impact upon the administration of federal criminal justice.

This case, the Acting Solicitor General said, "did not come within the Department's policy of disclosure." He declined to say which of the two requirements for disclosure were not met. The Department, by its refusal to specify the grounds for its nondisclosure, forces the assumption that there is illegal surveillance in this case,[2] and that it has decided the surveillance is not "arguably relevant."

Any disclosure requirement, including one regarding electronic surveillance, must accommodate two policies: the defendant's need for the information and the government's wish to preserve the confidentiality of internal governmental files and memoranda. When the issue is electronic surveillance, and a criminal prosecution is in train, the defendant's need to protect himself from illegal evidence-gathering makes his claim upon government files stronger than in any other litigating posture. *Dennis* v. *United States,* 384 U.S. at 873, n. 20. Correspondingly, since the government seeks to change the status quo and deprive the defendant of his liberty, its claims of privilege or confidentiality or irrelevance must be seen as correspondingly weak. See, *e.g., United States* v. *Reynolds,* 345 U.S. 1, 11-12 (1953); *United States* v. *Coplon,* 185 F.2d 629, 636-40 (2d Cir. 1950); *Zimmerman* v. *Poindexter,* 74 F. Supp. 933 (D. Hawaii 1947).

However, the balance ought to be struck, the law has been clear that the decision is for the judiciary. "Judicial control over the evidence in a case cannot

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[2] And, indeed, in every case where the Department is silent as to surveillance.

be abdicated to the caprice of executive officers." *United States* v. *Reynolds*, 345 U.S. at 9-10.[8]

How does this undisputed rule apply when the government has conducted electronic surveillance? First, there is the issue whether the government has "tapped" the defendant's wires or otherwise engaged in illegal surveillance. Absent some chance discovery of illegal surveillance, the defendant has a dificult task. It is made more difficult by the secretive and often affirmatively disingenuous behavior of government agents. See materials cited in Appendix A, *infra*. This behavior makes a surveillance case unlike a lineup case, *United States* v. *Wade*, 388 U.S. 218 (1967), or confession case, *Miranda* v. *Arizona*, 384 U.S. 436 (1966),

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[8] In the past, the Department has claimed the power to keep its internal files confidential and free from judicial scrutiny. In *U.S. ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951), this Court held that a regulation which required all demands for Department of Justice papers to be referred to the Attorney General was a valid "housekeeping" provision. The Court expressly declined to decide the validity of that portion of the regulation declaring all Department files confidential. The question left open in *Touhy* may be regarded as closed by the holding in *Reynolds, supra*, and in criminal cases the question is indisputably settled by *Roviaro* v. *United States*, 353 U.S. 53 (1957). See also *United States* v. *Cotton Valley Operators Cttee.*, 9 F.R.D. 719 (W.D. La. 1949), *aff'd by an equally divided Court*, 339 U.S. 940 (1950). Moreover, the Attorney General's regulations no longer declare Department files confidential, see Dept. of Justice Order No. 381-67, 32 Fed. Reg. 9662 (1967), and indeed could not do so under the statutory authorization for the regulation, 5 U.S.C. § 301. § 301 expressly provides that it "does not authorize withholding information from the public." The predecessor section, 5 U.S.C. § 22 (1964 ed., repealed), containing the same language, was expressly designed to correct a situation in which "every file clerk [had] become a censor." H. Rep. No. 1461, 85th Cong., 2d Sess., March 6, 1958, set forth in full at 1958 U.S. Code Cong. & Adm. News 3358, 3359. Thus, there is no conceivable judicial, statutory or administrative regulation support for the Department's intransigence.

for the defendant usually has no way of knowing that he has been "bugged" or that the fruits of the illegality have been made part of the case against him. However, Rule 16(a)(1), Federal Rules of Criminal Procedure, provides a procedure for discovering recordings of the defendant's voice, or transcripts thereof. Where the purpose of the discovery motion is to unearth illegal surveillance, production of all recordings may be a due process right as well, and the government may be required to come forward with all the facts. See Advisory Committee Notes on Rule 16, 39 F.R.D. at 175-76; *People* v. *Cartier,* 51 Cal.2d 590, 335 P.2d 114 (1959). *Cf. Brady* v. *Maryland,* 373 U.S. 83 (1963). The relevance requirement of Rule 16(a)(1) must be read in light of the government's obligation to purge its case of the taint of illegal surveillance. That is, recordings or transcripts which are not prima facie "relevant" may be revealed in the course of an adversary suppression hearing to be so related to the prosecution as to require its dismissal. Moreover, even though the recordings or transcripts are found to have nothing to do with the issues in the case in which they are produced, the court must nonetheless suppress them in order to prevent their future use. See *United States* v. *Baker,* 262 F. Supp. 657, 667 (D.D.C. 1966).

In any case, the determination of "relevancy" under Rule 16, like that of "privilege" under Federal Rule of Civil Procedure 34, is clearly for the Court and not for the Justice Department. *United States* v. *Reynolds,* 345 U.S. at 6-8. See also *Dennis* v. *United States,* 384 U. S. 855, 874-75 (1966).

The Department's surveillance position affronts more, however, than the policy of Rule 16. It offends as well policies set out by this Court as crucial to the

fair ordering of the adversary system. For example, in *Campbell* v. *United States, supra,* the issue was whether the defense was entitled under the Jencks Act, 18 U.S.C. § 3500, to see a report prepared by FBI Agent Toomey from a conversation with prosecution witness Staula. The government contended that the statement was Toomey's, not Staula's, and hence not producible after Staula's direct examination. The trial judge ruled that the defense could call Toomey as "their witness" an attempt to establish that the statement had been prepared as a substantially verbatim recital of Staula's words, or that Staula had adopted it. This action the Court held error. In his majority opinion, Mr. Justice Brennan affirmed that control of Jencks Act production is a judicial function, and that the government has a clear duty to come forward and disclose to the Court any information which may assist the judge in discharging his responsibility. 365 U.S. at 95-96. The Court declined to place upon the defendant "the burden . . . . of establishing facts peculiarly within the knowledge of his adversary." *Id.* at 96.

The same interests of prosecution and defense as in *Campbell,* see *id.* at 95, are involved when the existence, nature and extent of electronic surveillance must be ascertained. Indeed, it is shown below that the defense interest is stronger in an electronic surveillance case.

Another fruitful analogy may be drawn to *United States* v. *Reynolds, supra.* That case, involving government resistance to civil discovery in a Tort Claims Act suit of airplane crash information claimed to have national security value, dealt at length with the need for disclosure of information helpful to litigants,

and the countervailing need of government to shield some information from the public view. This Court drew upon its experience in cases in which the self-incrimination privilege is invoked, and held that in each case the decision whether to honor the privilege is with the Court. See 345 U.S. at 6-12.

In *Dennis v. United States,* 384 U.S. 855 (1966), this Court drew upon the teaching of *Campbell* and *Reynolds,* as well as that of such cases as *Roviaro* v. *United States,* 353 U.S. 53 (1957), and held the defendants entitled to production of grand jury minutes for use in cross-examination of government witnesses. But the majority opinion spoke broadly also of the prosecution's duty to come forward with material which might aid the defense. The Court placed F.R. Crim. P. 6(e)'s authorization for production of grand jury minutes squarely within the framework of Jencks Act and Rule 16 discovery, and put official imprimatur upon the growing movement for fuller discovery in federal criminal cases. See, *e.g.,* 384 U.S. at 871, nn. 16-.7. *Dennis* carries within it the theoretical basis for a move even beyond *Reynolds* and *Campbell,* for the Court exhorted trial judges to make disclosure the usual rule, and to intervene only in "unusual situations," on application of the government to deny or restrict disclosure. *Id.* at 874-75.

Thus, the power to lock "the doors that may lead to truth," id. at 873, which the Department of Justice claims in its *Schipani-Kolod* policy memoranda, is utterly without legal support and, indeed, runs contrary to the course of this Court's decisions in the field of criminal discovery.

Much more than this is at stake, however. The government is not merely seeking to bar access to "a

storehouse of relevant fact," *Dennis* v. *United States,* 384 U.S. at 873, but also to the truth about a massive campaign of electronic surveillance consciously conceived and directed by government agents in the knowledge that it was and is illegal.[4]

Given these disturbing facts, it is all the more important that the Department be denied the power it seeks, for that power makes it judge of its own cause in a field where its reputation stands most to be sullied by disclosure of illegality. *Cf. In re Murchison,* 349 U.S. 133 (1955); *Offutt* v. *United States,* 348 U.S. 11 (1954).[5] The Department's claim ignores, moreover, the plain mandate for judicial hearing set out in *United States* v. *Coplon,* 185 F.2d 629, 636-40 (2d Cir. 1960), cited with approval in *Dennis,* 384 U.S. at 874, n. 20, and the requirement of *United States* v. *Wade,* 388 U.S. 218, 240 (1967), that the government purge its prosecutions of illegal evidence-gathering by "clear and convincing proof."

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[4] Illegal electronic surveillance violates the Fourth Amendment rights of its victims. Those who conspire to commit such violations also violate 18 U.S.C. § 241, as authoritatively interpreted in *United States* v. *Price,* 383 U.S. 787, 803 (1966). Refusals by Department of Justice attorneys to respond to requests that they admit illegal surveillance raise serious questions under 18 U.S.C. § 4, the federal misprision of felony statute. See generally *Lancey* v. *United States,* 356 F.2d 407 (9th Cir. 1966). These questions are independent of and in addition to these arising under 42 U.S.C. § 1987 by the failure of the Department of Justice to prosecute the lawbreakers. See generally Comment, 74 *Yale L.J.* 1297, 1303-12 (1965).

[5] The material cited in Appendix A clearly reveals that the Department may have trouble getting its own agents to own up to illegality. A judicial hearing in the offing may serve to induce disclosure, and the checks upon veracity provided by cross-examination and publicity serve to further this end. See 2 Bentham, *Rationale of Judicial Evidence,* Ch. X, § 2 (1st ed. 1827).

In the vast majority of cases, disclosure of the operation of an electronic surveillance, and of its fruits, should pose no problem. Hence, the materials ought to be producible under Rule 16(a)(1). If the government feels the need for a protective order in the unusual situation, such as that "involving the nation's security or clearcut dangers to individuals who may be identified" by the material to be produced, *Dennis,* 384 U.S. 875, then an appropriate showing can be made.

In particular cases, proceedings or showings held partly in camera may be necessary, keeping in mind the clear ruling of the *Coplon* court, 185 F.2d at 636-40, that such proceedings pose serious dangers to the fair determination of a suppression motion and to the very right to public trial itself. The government has, in any event, made no such claim in this case.

It may well be that the remedy here proposed will occasion great expense and inconvenience to the government in litigating electronic surveillance issues. The remedy, however, is only coextensive with the wrong.

What Relief in This Case?

Counsel had been informed, before filing the application for an order suspending the effect of denial of certiorari, that petitioner Alderisio's place of business in Chicago was the target of electronic surveillance. If the surveillance was conducted during the time counsel is informed its was conducted, it is certain to have monitored conversations between counsel and Alderisio. This issue cannot, of course, be explored on this record. Presented here is the narrow, precise, clear question of who runs the system of criminal justice, the Department or this Court.

However, if the Court grants certiorari and throws over the Department's *Schipani-Kolod* policy, a full evidentiary hearing is the irreducible minimum required to protect petitioners' Fourth Amendment rights. See *Black* v. *United States,* 385 U.S. 26 (1966); *O'Brien* v. *United States,* 386 U.S. 345 (1967); *Hoffa* v. *United States* 387 U.S. 231 (1967); *Markis* v. *United States,* 387 U.S. 425 (1967). Whether such a hearing should be conducted as a posttrial proceeding on remand by this Court, as in *Hoffa,* or as a pretrial hearing after reversal of the conviction, is a difficult question. Petitioner urges that, if electronic surveillance is disclosed, the Court do as it did in *Black* and reverse for a new trial. As a practical matter, in a posttrial hearing the odds are heavily against the defendant in any criminal case. The government should not, by choosing an opportune time for disclosure, be able to deprive the defendant of his right to a pretrial hearing under Rule 41(e), Federal Rules of Criminal Procedure. The Rule 41(e) preference for a hearing prior to trial reflects a considered policy judgment, see Comment, 54 *Calif. L. Rev.* 1070, 1082-83 (1966), and is designed to protect the interest of the defendant, see *Battle* v. *United States,* 345 F.2d 438 (D.C. Cir. 1965), as well as the interest of the government and the courts in the expeditious administration of justice.

CONCLUSION

For the foregoing reasons, petitioners pray that rehearing be granted upon issue 1 and 2 in the petition for certiorari, and upon the additional issue tendered in this petition, and that upon the rehearing a writ of certiorari issue, the judgment of conviction be reversed, and the cause remanded for further proceedings. In the alternative, petitioners pray for an order directing

the Solicitor General to make a disclosure concerning electronic surveillance coextensive with that required in *Black* v. *United States,* 384 U.S. 983 (1966), and retaining jurisdiction pending the disclosure.

Respectfully submitted,

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November 2, 1967

Certificate

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that it is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

EDWARD BENNETT WILLIAMS

APPENDIX A

[Caption omitted]

Application for an Order Under Rule 25(2) Suspending the Order of Denial of Certiorari Pending Filing of a Petition for Rehearing

To the Honorable Byron R. White, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit:

The petitioners* hereby respectfully pray for an order pursuant to Rule 25(2) of the Rules of this Court, suspending this Court's order of Monday, October 9, 1967, denying certiorari to the United States Court of Appeals for the Tenth Circuit.

The grounds for this motion are that unless the order is suspended, the pertioners' bail will very likely be revoked before a petition for rehearing can be presented to this Court. The petition for rehearing will present substantial legal and factual material which has come to the attention of counsel for the petitioners since the filing of the petition for certiorari, and which counsel believes warrants reconsideration of the petition.

The facts giving rise to this application are as follows: The petition for certiorari was filed May 7, 1967, and denied on October 9, 1967. Question No. 2 in the petition dealt with the trial judge's refusal, during the course of a post-trial hearing, to permit inquiry into eavesdropping or wiretapping in Chicago during which petitioner Alderisio's voice was overheard. In his response to the petition, the Solicitor General argued only that the refusal to permit inquiry was proper in the post-trial procedural context. The reply did not mention the existence vel non of illegal electronic surveillance, though the record clearly warranted

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* Petitioner Kolod died in August, 1967, while the petition was pending. The issues tendered in this motion and in the petition for rehearing apply to petitioners Alderman and Alderisio.

the customary investigation by the Solicitor General and a statement concerning its existence. See Supplemental Memorandum for the United States, No. 504, October Term 1966, *Schipani* v. *United States,* p. 5. Thus, when certiorari was denied, petitioners' counsel immediately initiated conversations with the Department of Justice to secure a statement on the record concerning illegal surveillance involving Alderisio. These conversations are still going on, and the Acting Solicitor General has authorized petitioners' counsel to say that, upon his completion of certain inquiries and discussions within the Department of Justice, he will inform counsel, well within the time for filing a petition for rehearing, whether he will make a statement on the surveillance issue. This fact alone, counsel submits, justifies suspension of the order of denial so that, after the Acting Solicitor General has made whatever representation he cares to make, the matter can be examined anew by the whole Court. Examination by the entire Court has been conducted in the past, with varying results depending upon the circumstances. See *Black v. United States,* 385 U.S. 26 (1966); *O'Brien* v. *United States,* 386 U.S. 345 (1967); *Hoffa* v. *United States,* 387 U.S. 231 (1967); *Markis* v. *United States,* 387 U.S. 425 (1967).

In addition to the above, counsel learned for the first time in June and July 1967 of additional facts which perhaps explain the willingness of government counsel to inquire anew into electronic surveillance in this case. A hearing on a motion to suppress in *United States* v. *Nesline,* Cr. No. 535-65, D.D.C., in June 1965, uncovered a large-scale FBI effort to conceal from government counsel and the courts the existence and nature of electronic surveillance in federal criminal cases. The FBI revealed that Nesline had been "bugged" through a device in Miami. The information thus obtained was sent to the Washington Field Office of the FBI, labelled as having come from "MM 972-C*). The asterisk indicated to the Field Office that the report in question was the product of a "bug". The

Washington case agent then transmitted the information to the Department of Justice attorneys, identifying its source with a new symbol, "WFT-170", the type of designation normally used for confidential informants and other legal (and live) sources. One of the government attorneys in Nesline stated that he understood from the WFT designation that the information had been supplied by a live informant. Transcript of Proceedings before Judge Oliver Gasch, June 29-30, 1967, *United States* v. *Nesline*, Cr. No. 536-65, D.D.C., pp. 203-05, 260-62. In addition to thus masking the nature of its reports on Nesline, the FBI was affirmatively disingenuous with government attorneys who sought to learn the truth. Nesline's initial suppression motion had asked for all electronic recordings of his conversations. The prosecutor testified that the reason for his original denial that any existed was that the FBI case agent had so informed him. He had to reverse himself shortly before trial when the Miami device came to light. The FBI case agent testified that he had refrained from disclosing the Miami "bugging," because he had assumed the prosecutor was asking about "bugging" directed at Nesline, not that which, although nominally directed against others, picked up Nesline's conversations. *Id.* at 212-13, 304-05. The Solicitor General has of course conceded the necessity to investigate to determine whether illegal surveillance exists, Supplemental Memorandum for the United States, *Schipani* v. *United States*, No. 504, October Term 1966, p. 5, but the *Nesline* hearing makes clear that the need is greater than had previously been thought.*

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* Other examples of concealment may be cited as well. In the case of *McGarry* v. *United States*, No. 6925, 1st Cir., argued and pending decision, the government revealed after the jury was in the box that the defendant had been picked up on a wiretap. Put to a hearing on the spot, the defense nonetheless discovered from Owen Burke Yung of the Internal Revenue Service that in the course of his Organized Crime Division duties he had conducted many wiretaps, and that he listened to wiretap tapes recorded by others, caused the tapes to be erased, then communicated the in-

The government's only justification for originally withholding the truth about the "bugging" in *Nesline* was that "the Schipani policy had not been adopted at that time." At the trial court's rejoinder that "policy is one thing; truthfulness is another," the prosecutor explained that before *Schipani*, "the policy simply was that the defendants had to make their showing under Nardone." Absent such a showing by the defendant, the government had "no policy [of] delving deeply into what may have gone on . . . ." Nesline transcript, *supra*, at 10-13, 18-19.

Counsel respectfully submits that the circumstances justify suspension of the order denying certiorari pending the Acting Solicitor General's answer and the filing of a petition for rehearing based upon it. The showing above gives far more reason to believe that a petition for rehearing would be granted than the statements of counsel in *Flynn* v. *United States*, 99 L. ed. 1298 (1955), in which Justice Frankfurter granted, under former Rule 25(2), the relief requested here. In that case, counsel for the petitioners, leaders of the Communist Party of the United States, stated only an intention to file a petition for rehearing "presenting grounds which were not raised in the petition for certiorari, but which are available to them, and which are of a substantial nature."

Justice Frankfurter said:

> "A petition for rehearing of a denial of a petition for a writ of certiorari is part of the appellate procedure authorized by the Rules of this Court, subject to the requirements of Rule 58. The right to such a

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formation to the appropriate OCD regional coordinator. On his worksheets, he logged this illegal activity as "engaged in OCD duties." Thus, every effort appears to have been made to conceal the source of illegally-obtained information, and to frustrate the discovery of the illegality by those whose liberty was placed in jeopardy as a result of it. Brief for Appellant, *McGarry* v. *United States*, No. 6925, 1st Cir., pp. 49-55.

consideration is not to be deemed an empty formality as though such petitions will as a matter of course be denied. This being so, the denial of a petition for certiorari should not be treated as a definitive determination in this Court, subject to all the consequences of such an interpretation. Accordingly, on an appropriate showing that a substantial matter, as required by Rule 58, is to be presented, appropriate opportunity should be given for doing so." 99 L. ed. at 1299.

This case presents another parallel with *Flynn*. Here, as there, there is no indication in the record or otherwise that petitioners have in any manner abused their enlargement upon bail. Indeed, since denial of the writ, petitioner Alderisio has been in almost constant touch with counsel. It should be noted, moreover, that just four years prior to Justice Frankfurter's order in *Flynn* (a Smith Act case), four Communist Party Smith Act defendants whose convictions were affirmed in *Dennis* v. *United States*, 341 U.S. 494 (1951), had jumped bail. Two of them were still at large at the time of Justice Frankfurter's order. See *United States* v. *Hall*, 101 F. Supp. 666 (S.D.N.Y. 1951), *aff'd*, 198 F.2d 726 (2d Cir. 1952), *cert. denied*, 345 U.S. 905 (1953); *United States* v. *Thompson*, 117 F. Supp. 685 (S.D.N.Y. 1953), *aff'd*, 214 F.2d 545 (2d Cir.), *cert. denied*, 348 U.S. 841 (1954); *United States* v. *Green* and *United States* v. *Winston*, 140 F. Supp. 117 (S.D.N.Y. 1956), *aff'd*, 231 F.2d 631 (2d Cir. 1957), *aff'd*, 356 U.S. 165 (1958). Thus, if anything, this case is *a fortiori Flynn*.

It appears, therefore, that relief under Rule 25(2) is warranted on the law and the facts, and it is therefore respectfully prayed that the order of denial be suspended either pending the filing of a petition for rehearing within the time set by Rule 58, or within the time and upon the conditions the Court or Circuit Justice may direct. *Flynn* v. *United States*, 99 L. ed. at 1298.

APPENDIX B

[Caption omitted]

Response to Application for an Order Under Rule 25(2) Suspending the Order of Denial of Certiorari Pending Filing of a Petition for Rehearing

In their petition for a writ of certiorari, petitioners presented the following question (among others):

> 2. Whether, in a case where the government has admitted illegal FBI eavesdropping in premises belonging to one of the defendants and defense counsel has represented in open court the existence of newly discovered evidence of additional illegal eavesdropping in premises belonging to another of the defendants, the government is obligated either to deny the alleged additional eavesdropping or, if not denying it, to disclose its details to the defense.

The government's argument, made in response to this question, was that the trial court, acting pursuant to a limited remand by the court of appeals, had properly confined its hearings to issues within the scope of the remand and that petitioners' allegations of eavesdropping of petitioner Alderisio in Chicago were outside the scope of the proceding. See Brief in Opposition, pp. 11-12. This does not mean that petitioners could not have sought other appropriate relief from the district court or that they are now precluded from doing so.

Following the Court's denial of the writ on October 9, 1967, petitioners' counsel called the undersigned and requested him to look into petitioners' allegations relating to eavesdropping of petitioner Alderisio in Chicago. I advised counsel that I presumed that the government had already looked into the matter fully pursuant to its program of review as described in the government's supplemental memorandum to this Court in the case of *Schipani* v. *United States*, October Term, 1966, No. 504. I stated that I would

undertake to confirm this, to secure a re-examination of information possessed by this Department, and to advise counsel if we concluded that the government was obligated to make any disclosure to the courts pursuant to the policy which it has followed. That policy, as has been stated on prior occasions, is that the Department will undertake to make disclosure to the courts if it finds (1) that there has been an electronic surveillance which is or may be unlawful, and (2) that the government has thereby obtained any information which is arguably relevant to the litigation involved.

A check reveals that petitioner Alderisio was covered by the Department's review procedures and that it was previously determined by appropriate officials of this Department that his case did not come within the Department's policy of disclosure. Re-examination of the matter has not altered this conclusion.

In light of the above, it appears to us that petitioners' contemplated petition for rehearing will present no issue not previously argued in the petition for a writ of certiorari and that there is no change of circumstance which calls for a different disposition of the case. For these reasons, we oppose the application.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.

OCTOBER 1967.

APPENDIX C

[Caption omitted]

Reply Memorandum Re Application for an Order Suspending the Order of Denial of Certiorari

The Department of Justice, through the Acting Solicitor General, has filed its response to the petitioner's application. By its response, the disquieting elements of the government's *Schipani* memorandum are shown to carry all the danger their words portended: The Department of Justice has arrogated to itself the power to decide the crucial issue in every surveillance case—the extent of the taint—and has thereby usurped a power which Article Three commits to this Court. By insisting it has no duty to disclose except when it finds the surveillance to have been "arguably relevant to the litigation involved," the Department apparently asks this Court to assume, *arguendo,* that there is illegal surveillance in this and, indeed, in every case. One must make this assumption under the Department's two-step test, for the Acting Solicitor General insists on stating his grounds for nondisclosure in the form of two independent alternatives. The second of these alternatives, the "relevancy" determination, is presumably equivalent to the "materiality" determination mentioned in the *Schipani* memorandum. The Department has apparently forgotten that Rule 41(e), Federal Rules of Criminal Procedure, commits to the judiciary the function of ordering illegally seized property returned and commanding evidence illegally obtained suppressed.

The Department asks more, however. It asks leave to conceal the illegal conduct unless it, the attorney for the lawbreaker, sees fit to disclose it. Of course, the Department has no incentive to reveal the illegal activity. Moreover, the sort of investigation which its makes can *never* be as complete and careful as one conducted under proper safeguards in an adversary proceeding. To paraphrase this Court in *Dennis* v. *United States,* 384 U.S. 855, 874-75

(1966), in our adversary system, it is enough for prosecutors to prosecute. "The determination of what may be useful to the defense can properly be made only by an advocate." *Ibid.*

We do not here challenge the veracity or integrity of government counsel, but only underscore that no man is fit to judge his own cause, *In re Murchison,* 349 U.S. 133 (1955), let alone argue his opponent's.

Furthermore, the Department's policy is squarely at odds with the mandate of *United States* v. *Wade,* 388 U.S. 218, 240 (1967), that the government dispel the taint of illegal evidence-gathering by "clear and convincing proof."

Upon the grounds above stated, and upon the grounds set forth in the original application, petitioners respectfully pray for an order suspending the order denying certiorari. The initial application was not lightly filed, but only after counsel had been reliably informed that there was electronic surveillance of petitioner Alderisio at his place of business in Chicago. Petitioner believes that a petition for rehearing, in the present posture of the case, would present substantial issues not tendered by the petition for certiorari.

APPENDIX D

[Caption omitted]

Order

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the effect of the order denying certiorari in the above-entitled case be, and the same is hereby, suspended pending the timely filing and disposition of a petition for rehearing.

s/ BYRON R. WHITE
Associate Justice of the
Supreme Court of the United States.

Dated this 17th day of
October, 1967.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 133

RUBY KOLOD, WILLIE ISRAEL ALDERMAN AND FELIX ANTONIO ALDERISIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR REHEARING FROM THE DENIAL OF THE PETITION FOR A WRIT OF CERTIORARI

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners Alderman and Alderisio [1] seek a rehearing of the order of October 9, 1967, denying their petition for a writ of certiorari.

1. This case involves a conspiracy between 1961 and 1962 to transmit in interstate commerce communications containing threats to injure and murder Robert Sunshine.[2] It grows out of efforts of petitioner Kolod, now deceased, and petitioner Alderman to use threats to recoup money from their association with Sunshine

[1] Since petitioner Kolod died in August 1967, the petition for a writ of certiorari, as to him, should be dismissed.

[2] The facts are detailed in the opinion of the court of appeals, reported at 371 F. 2d 983, and in our brief in opposition.

288-553—68

in an oil venture. During the course of the conspiracy, on July 6, 1961, petitioner Alderisio appeared at Sunshine's office in Denver and told Sunshine that Kolod had sent him to kill Sunshine. Alderisio did not testify.

In the petition for rehearing (p. 11) petitioners' counsel states that he has been informed that petitioner Alderisio's place of business in Chicago was the target of electronic surveillance and that "[i]f the surveillance was conducted during the time counsel is informed it was conducted, it is certain to have monitored conversations between counsel and Alderisio." As *Black* v. *United States*, 385 U.S. 26, *O'Brien* v. *United States*, 386 U.S. 345, and *Granello* v. *United States*, 386 U.S. 1019, illustrate, however, the government is now committed to the disclosure of any interception of a communication between a defendant and his attorney in a pending case whether or not the conversation is believed relevant to the issues in the case. The government has not intercepted any communications between counsel and Alderisio.[3] We also advise the Court that no overheard conversation in which any of the petitioners participated is arguably relevant to this prosecution.

We note additionally that the facts of record negate the likelihood of any undisclosed taint. The gist of the case involves threatening conversations between Kolod and Alderman and the victim. Sunshine testified at

[3] If petitioners dispute this denial and have evidence which they wish to present, obviously they are not precluded from seeking appropriate relief in the district court.

the trial that, while he was awaiting sentence on criminal charges, he told law enforcement officials about these threats (1 R. 165). The source of the government's information concerning this offense is patent.

So far as relevant to petitioners' claims, it is the policy of the Department of Justice to make disclosure to the courts if it finds (1) that a defendant was present or participated in a conversation overheard by unlawful electronic surveillance, and (2) that the government has thereby obtained any information which is arguably relevant to the litigation involved. We believe that this policy conforms to established principles of criminal law with respect to the prosecution's role in the administration of criminal justice. We submit that there are two aspects to the prosecution's duty to make a disclosure. It extends (1) to information which has arguable relationship to the case involved, and (2) does not include information which has no connection with the matter being prosecuted. The second of these aspects is important, both to protect the courts from the burden of examining irrelevant material, and to protect other persons who have no connection with the pending litigation.

In resolving this problem, a line obviously has to be drawn somewhere. The argument made by the petitioners that the Department is (Pet. for Rehearing, p. 10) seeking to be "judge of its own cause" is plausible and appealing. But it is too facile and superficial. Prosecuting authorities are officers of the Court.

They are constantly called on to make judgments which affect the administration of justice. If, for example, the prosecuting officers were to advise the Court that there was no record of any surveillance in a particular case, it would be hard to go beyond the certificate. Surely, counsel for the accused would not be allowed to go through all records and papers of the Department of Justice to show the contrary, because, among other things, those records and papers are wholly irrelevant, and the Department has an obligation, in the administration of justice, to keep them confidential, and not to disclose facts about other persons which might injure them, with no possible application to the particular case.

In an effort to deal with the problems involved, the Department has taken careful steps, and has formulated a definite policy, of which this Court has been advised. In the supplemental memorandum in *Schipani v. United States*, No. 504, O.T., 1966, it was stated (at p. 5):

> Recognizing its obligation not to use evidence in violation of a defendant's protected rights in any criminal prosecution, the Department has initiated a program to discover prior instances in which this may have occurred. An extensive review is presently being conducted in order to determine the instances in which there might have been monitoring affecting a case which has been brought to trial * * *. The government will promptly notify the appropriate court when any material discovery is made.

Thereafter, in order to assure faithful and uniform implementation of the Department's policy, the Attorney General established a Committee charged specifically to handle this question. The Memorandum of the Acting Attorney General establishing this Committee is reproduced as an Appendix (page 11, *infra*). The Committee consists of the Solicitor General and three Assistant Attorneys General. Although the memorandum says that these officers may be represented by their "designees," these officers have in fact ordinarily participated in person, except that Mr. Ralph S. Spritzer, the First Assistant in the Solicitor General's Office, has been the representative of that office when he has been Acting Solicitor General. This Committee has met frequently for more than a year. It reviews cases in which a defendant has been overheard by unlawful electronic surveillance, whether he was the direct object of surveillance or not. This committee has followed the precept that a conversation of a defendant overheard by such means shall be disclosed to the appropriate court if arguably relevant to the litigation involved.

The Court should be advised that the character of material is such that the members of this Committee, or any one of them, are not able to read personally every word. Instead they necessarily rely on reviews and reports made by subordinate personnel in the Department of Justice. In each case the persons making the detailed examination are lawyers, subject to professional standards, carefully chosen by their superi-

ors. They report in detail on what they find, and put specific items or passages before the Committee for its examination and consideration.

In this case, the review was made by two experienced lawyers on the legal staff of the Department of Justice. The Solicitor General has talked with both of them, one in person, and the other by telephone, as he is now in a distant part of the country. In each case, the Solicitor General is satisfied that the examination was carefully, understandingly, and conscientiously made, and that an accurate reflection of the material in question has been presented. In addition the Solicitor General has himself gone over the material, and has read much of it, and has read all passages which were brought to his attention as having any bearing on the Department's policy as stated above. As a result of his inquiries and examination, he is satisfied that there is nothing that is arguably relevant to the present case.

In undertaking to notify the court whenever it found it had information of arguable relevance to the litigation, the Department of Justice went beyond the requirements of disclosure established by such cases as *Brady* v. *Maryland*, 373 U.S. 83, and *Giles* v. *Maryland*, 386 U.S. 66. In *Brady*, this Court said (373 U.S. at 87): "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment * * *." Implicit in this decision is the premise that the prosecutor must decide what is material evi-

dence that must be disclosed and what is immaterial evidence that need not be disclosed. It has never been thought necessary for the trial judge to examine the government's files in every case to determine whether all *material* evidence has been disclosed.

In practically every criminal case the prosecution must decide whether information in its files calls for notification to the court or the defense. If a particular witness is not called, the prosecution must determine whether the witness could give relevant testimony which would be favorable to the accused. If so, the name of the person interviewed may have to be disclosed to the defense. The prosecution always has the duty to separate material which arguably might be said to have a connection with the case being tried from material which has no such relationship.

The fact that the prosecutor must exercise judgment over disclosure is recognized by the Federal Rules of Criminal Procedure. Rule 16 does not require the government to turn over material which has no relationship to the criminal prosecution. Rather, it authorizes the court, upon motion of a defendant, to permit the defendant to inspect and copy any "relevant" papers in the possession of the government including "written or recorded statements or confessions made by the defendant" and his recorded testimony before the grand jury. The prosecutor, therefore, must first decide what is relevant.

Similarly, the prosecutor is often called upon to make an initial determination of relevancy when responding to demands for the grand jury testimony of

a witness or for statements which must be produced under the Jencks statute, 18 U.S.C. 3500. If the witness has given information in several unrelated cases and there is room for argument as to whether a particular statement may or may not relate to the facts of the case on trial, the arguably relevant statements are shown to the court for its decision. However, it has never been suggested that the prosecution should produce, or the courts be required to examine, all statements given by a person which may be in the government files even though they bear no relationship to the particular case.

The government has not been niggardly in its interpretation of what is arguably relevant. Of the 11 cases[4] in which the government has made disclosure of arguably relevant material, but has contended that the surveillance did not taint its case, taint has not been found in any instance.[5]

In a memorandum dated November 3, 1966, addressed to all United States Attorneys, the then Acting Attorney General, Ramsey Clark, stated the De-

---

[4] *United States* v. *Randaccio* (W.D.N.Y.); *United States* v. *Hoffa*, 278 F. Supp. 141 (N.D. Ill.); *United States* v. *McGarry*, (D. Mass.); *United States* v. *Kelley* (D. Mass.); *United States* v. *Kress* (S.D. Miss); *United States* v. *Carabbia*, 381 F. 2d 133 (C.A. 6), certiorari denied, No. 690, this Term, December 11, 1967; *United States* v. *Nolan* (N.D. Okla.); *United States* v. *Di Piazza* (S.D. Ohio); *United States* v. *Beckley* (S.D. Fla.); *United States* v. *Daddano* (N.D. Ill.); *Battaglia* v. *United States*, 383 F. 2d 303 (C.A. 9), petition for writ of certiorari pending, No. 967, this Term.

[5] There are seven cases in which there has been a disclosure but no final hearing.

partment's policy with regard to electronic eavesdropping: "This Department must never proceed with any investigation or case which includes evidence illegally obtained or the fruits of that evidence. No investigation or case of that character shall go forward until such evidence and all of its fruits have been purged and we are in a position to assure ourselves and the court that there is no taint or unfairness." The government has undertaken to implement that policy scrupulously and without thrusting upon the courts the burden of screening obviously irrelevant material.

For the foregoing reasons, it is respectfully submitted that the petition for rehearing should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

JANUARY 1968.

APPENDIX

JANUARY 6, 1967.

[To]
The Solicitor General.
Assistant Attorney General Vinson.
Assistant Attorney General Rogovin.
Assistant Attorney General Yeagley.
[From]
Mr. Ramsey Clark,
Acting Attorney General.

DEPARTMENTAL POLICY IN CASES INVOLVING ELECTRONIC SURVEILLANCE PROBLEMS

In order to assure uniformity of policy in cases that pose electronic surveillance problems and to regularize the informal procedures followed heretofore, all such cases should be referred by the operating Division for resolution to a committee composed of Solicitor General Thurgood Marshall or his designee, Assistant Attorney General Fred Vinson or his designee, Assistant Attorney General Mitchell Rogovin or his designee, and Assistant Attorney General Yeagley. Mr. Yeagley shall serve as chairman.

The committee shall consider in each case where an illegal surveillance problem exists whether the facts justify a disclosure and where they do, the procedure best used under the circumstances.

It is important that such matters be referred to the committee as early as possible, together with copies of pertinent pleadings, documents, and briefs. Mr. Yeagley will present committee recommendations to me for review.

U.S. GOVERNMENT PRINTING OFFICE, 1968

SUPREME COURT, U. S.

JAN 12 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 133

RUBY KOLOD, WILLIE ISRAEL ALDERMAN and FELIX ANTONIO ALDERISIO, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for Rehearing From the Denial of the Petition for a Writ of Certiorari

MOTION FOR LEAVE TO FILE REPLY MEMORANDUM AND REPLY MEMORANDUM TO MEMORANDUM OF THE UNITED STATES IN OPPOSITION

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RUBY KOLOD, WILLIE ISRAEL ALDERMAN and FELIX ANTONIO ALDERISIO, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent*

MOTION FOR LEAVE TO FILE REPLY MEMORANDUM

Petitioners, through their undersigned counsel, move this Court for leave to file the attached memorandum in reply to the "Memorandum for the United States in Opposition". The grounds for this motion are that the government's memorandum introduces questions of fact and law to which reply is appropriate. It is

believed that this reply will aid the Court in its determination of the petition for rehearing.

Respectfully submitted,

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OCTOBER TERM, 1967

No. 133

RUBY KOLOD, WILLIE ISRAEL ALDERMAN and FELIX ANTONIO ALDERISIO, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY MEMORANDUM TO MEMORANDUM OF THE UNITED STATES IN OPPOSITION

The government's memorandum asserts propositions both of law and of fact in support of its startling assertion that a committee of Justice Department lawyers, acting on information vouchsafed them by the FBI, has the power to foreclose judicial inquiry into admitted violations of the Fourth Amendment. This memorandum addresses itself to propositions of fact underlying petitioners' lack of confidence in the Justice Department's *in camera* determinations, and propositions of law, with roots tracing to Lilburne's day,* affirming that the Justice Department's policy is at war with the Bill of Rights concept of adversary litigation.

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* See 4 How. St. Tr. 1269, 1273 (1649).

I. The Justice Department's Examination Does Not, In Fact, Lead to the Discovery of Truth

The government cites, Gov't Mem., p. 8, a string of cases in which its statements that illegal eavesdropping did not taint its case have been upheld by courts. How vigorous the challenge was in any of those cases, or how thorough the examination, does not, of course, appear. In the pleadings filed heretofore, petitioners have cited instances which would counsel against always giving implicit faith to the government's "no-taint" assurances. Petitioner invites the Court's attention to the following additional instance, which developed since the Court's order of December 4 that the Solicitor General file his memorandum herein.

In *United States* v. *Black,* Crim. Nos. 650-63, 651-63, D.D.C., on remand, 385 U.S. 26 (1966), a hearing on a motion for discovery and inspection of the fruits of electronic surveillance began before District Judge William B. Jones in December 1967. On December 13, 1967, Justice Department attorney Charles J. Alexander said in open Court, referring to the intra-Bureau memoranda prepared by FBI Agent Pennypacker from the logs of microphone surveillance:*

> "The Federal Bureau of Investigation couldn't have cared less about Mr. Black's tax case. If that is true, then I say, if at this stage it is not going to have any great detail about his tax case in this material." Transcript of Proceedings, December 13, 1967, p. 376.

Mr. Alexander had been assigned to the *Black* case shortly after this Court's remand order and had per-

* Pennypacker supervised both the legal and the illegal parts of the Black investigation. Transcript of Proceedings, December 18, 1967, p. 563.

sonally attempted to acquaint himself with the extent of electronic surveillance. He had done this by sending memoranda, through channels, to the FBI, and getting back certain information, through channels, from the FBI. Id., December 11, 1967, pp. 43-47.

The representation by Mr. Alexander concerning the *Black* tax case turned out to be very much in error when, five days later, the government, by order of Judge Jones, turned over these "Airtels" (intra-Bureau messages) prepared by Agent Pennypacker. *Id.*, December 18, 1967, p. 596.* They reveal a deep FBI interest in the tax case:

> "Mr. Wadden: * * *
>
> There are 8 AIRTELS asking action by the Kansas City office that obviously originate out of the information that come [sic] from the bug. I certainly think we have a right to that, such as one AIRTEL goes out and tells them to try to identify all witnesses appearing before the grand jury. We ought to know what they did in connection—
>
> The Court: I think you are right. * * *" *Id.* at p. 576.
>
> * * * * *
>
> "Mr. Wadden: * * *
>
> Your Honor, if you may remember, we got the same type of argument that goes on and on and Your Honor finally makes up his mind, last Thursday when we were told that the FBI investiga-

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* The Airtels were turned over to defense counsel in the *Black* case under a protective order against their disclosure. The material in this memorandum is drawn entirely from the transcript of proceedings in open court. The Airtels referred to are, of course, available to this Court.

tion had absolutely nothing to do with the tax case. We finally got the AIRTELS, Your Honor, and Your Honor knows, several places such as AIRTEL of the 15th of March, Your Honor, at the end of it it says this information is of no interest to the tax case so will not be disseminated to the Kansas City office.

"Another one starts out, Your Honor, this information primarily designated on Black's tax case. * * *" *Id.* at 594-95.

* * * * *

"The Court: An AIRTEL is prepared at headquarters, a copy goes to Kansas City: check on the grand jury witness and give us a report. I understand a reply would be made to the Washington Field Office, am I correct?

A. [by FBI Agent Pennypacker]: Yes, sir.

The Court: A copy would go to headquarters?

A. In the normal order of correspondence, if a copy goes to headquarters the original would go to headquarters and a copy to Washington Field. I don't recall at this point how Kansas City handled it.

The Court: In any event it would be in the Washington Field Office. Now certainly that seems to be a document that pertains to the Black tax case, it was the Black grand jury, you certainly would agree?

A. Yes." *Id.* at 605-06.

Mr. Alexander's veracity is obviously not being challenged. What is in issue is the difference in result between an *in camera* and *ex parte* proceeding and one in which, by the often tedious and slow process of adversary inquiry, a semblance of truth begins to emerge.

Mr. Alexander, the government must concede, was a lawyer "subject to professional standards, carefully chosen by [his] superiors," Gov't Mem., pp. 5-6, and he is assuredly an "officer of the court," *Id.* at 3.

It appears, moreover, from the government's memorandum filed herein that the intradepartmental examination extends only to the overheard conversations themselves, and not to investigative reports reflecting leads or evidence obtained as fruits of the illegality. The *Black* case makes patent the unreliability of such an examination, for it was not the logs of recorded conversations but the secondary materials that revealed FBI concern with Black's tax case. Because Mr. Alexander's investigation apparently did not extend to the secondary material, he found himself making his December 13 representation. As Agent Pennypacker made clear, surveillance whose purpose is intelligence-gathering is primarily useful as a means of obtaining leads for investigation of the target subject through compiling information on his activities and the activities of every person with whom he came in contact. Transcript of Proceedings, December 18, 1967, pp. 563-64, 610 (testimony of Agent Pennypacker).*

One wonders whether the government's *Schipani-Kolod* policy would have required disclosure in *Black* had not an attorney-client invasion been discovered. Wonderment increases as one reads Memorandum for the United States, *Black* v. *United States,* No. 1029,

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* It appears, moreover, that legal and illegal materials are filed all together and an FBI supervisor communicating with the Justice Department will not always know which is which. Transcript of Proceedings, December 19, 1967, pp. 645, 671.

October Term 1965, p. 2, and the statement therein that the FBI investigation was "unrelated to the tax case."

The generality of the government's memorandum in this case forecloses inquiry as to the specifics of its procedures and the extent of its inquiry. Such matters may, it is suggested, appropriately be left to further briefing and argument upon rehearing. Compare *Black* v. *United States,* 385 U.S. 26 (1966). Clearly, however, the eminence of the persons who sit in secret judgment upon cases of illegal surveillance ought not to obscure the fact that the tribunal is governed entirely by what the FBI—or other erring agency—submits for consideration, is staffed by persons who are professional prosecutors, is dealing with the rights of defendants who in most cases are high on the list of persons whom the government would like to convict, and is proceeding by means historically thought to conduce to the suppression of truth rather than its discovery.

II. The Justice Department's Mode of Examination Finds No Justification in Law

Petitioners will not here repeat the central contentions they have already made. Four additional observations are called forth by the government's memorandum.

1. Even if the government's committee of lawyers be thought of as an *ad hoc* non-judicial administrative tribunal, its procedures offend against the fundamental canons of fairness embodied in, for example, the Administrative Procedure Act, 5 U.S.C. §§ 554-57. They also violate due process of law. *United States*

v. *Abilene & Southern Ry. Co.*, 265 U.S. 274 (1924) (Brandeis, J.).

2. The control of the intradepartmental proceedings by the offending agency itself raises an additional serious problem. The agents are not subjected to cross-examination; the scope of inquiry can never be as broad as when opposing counsel are present to press for additional facts and documents. Less than a month ago, this Court affirmed the necessity of obtaining the intervention of a disinterested magistrate whenever a *prima facie* lawful search is to be conducted by electronic means. *Katz* v. *United States*, 36 U.S.L.W. 4080, 4083 (December 18, 1967). Were it otherwise, the Court said, individuals would be "secure from Fourth Amendment violations 'only in the discretion of the police.' " *Ibid.* In light of this declaration, can the government seriously claim that there need be no judicial intervention *after* an admittedly illegal search, to determine to what extent the defendant's rights have been violated?

3. The government's concept of the credit to be given to statements by an "officer of the court" is contrary to that expressed in decisions of this Court. As noted above, the representations of such officers can rest upon no higher plane than the reliability of their informants, who are the persons responsible for the illegality in the first place. Second, in the analogous Jencks Act situation, this Court has viewed the role of officer of the court differently. *Campbell* v. *United States*, 365 U.S. 85, 96 (1961). Third, the government asserts by way of analogy that a certificate that there was *no* illegal surveillance could probably not be controverted. Gov't. Mem., p. 4. Peti-

tioner respectfully suggests that such a certificate should in every case be subject to inquiry to determine the extent of the search by government counsel through government files. Finally, the government's entire discussion of the role of prosecutors and of its review board appears to rest upon a presumption of regularity which customarily attaches to the operations of government. But as a district judge has remarked about another bit of government malfeasance, in *United States* v. *Procter & Gamble Co.*, 174 F. Supp. 233, 237 (D.N.J. 1959), on remand from this Court in *Procter & Gamble Co.* v. *United States*, 356 U.S. 677 (1958):

> "[T]his presumption of regularity . . . is effective, like other presumptions of fact, only in the absence of evidence to the contrary."

The "evidence to the contrary" is in, given the disclosures thus far of illegal surveillance.

4. Permeating the government's memorandum is solicitude for persons about whom disclosed electronic surveillance may contain embarrassing facts, Gov't Mem., p. 4, and for the time of the courts who must review the results of the government's illegality. If it is embarrassment to third parties—rather than to itself—which is the government's concern, their rights can be protected by appropriate orders under Federal Rule of Criminal Procedure 16(e). See *Dennis* v. *United States*, 384 U.S. 855, 875 (1966). The second consideration—economy of judicial time—is also important, but it is singularly inappropriate that the attorney for a confessed lawbreaker should invoke it as a reason for not having his client haled into court.

CONCLUSION

The government's memorandum establishes all the more urgently, it is submitted, the need for authoritative guidance by this Court concerning the circumstances under which electronic surveillance should be disclosed. The question raised in the petition for rehearing and squarely faced in the government's reply is by the government's own admission central to the administration of the mass of illegally-obtained material now in the government's possession, and therefore to the administration of criminal justice in a large and important class of cases.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 133

RUBY KOLOD, WILLIE ISRAEL ALDERMAN AND FELIX ANTONIO ALDERISIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR REHEARING FROM THE DENIAL OF THE PETITION FOR A WRIT OF CERTIORARI

MOTION TO MODIFY THE ORDER OF THE COURT

In responding to the petition for rehearing in this case, we addressed ourselves solely to the considerations which, in our view, supported the disclosure policy of the Department of Justice—that is to say, the policy of disclosing electronic surveillance only when an examination of the fruits of that surveillance revealed that information arguably relevant to the case at issue had been obtained.

In granting the petition and vacating the judgment herein, the Court has accepted petitioner's argument that the Department of Justice should not be empowered to make that determination for itself. We do

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not seek to reargue that question and accept as settled by the Court's order the proposition that here, as in other areas, decisions affecting the rights of the defendant should be subjected to "detached scrutiny by a neutral magistrate." *Katz* v. *United States,* No. 35, this Term, decided December 18, 1967, Sl. Op., p. 9.

Because we viewed the government's policy to be in accord with the principles relating to the prosecutor's duty in criminal cases as set forth in prior opinions of this Court, we did not address ourselves to the question of the procedure that should be adopted if the Court were to find that our policy did not adequately protect the rights of the defendant. Since we believe that this procedural question is an important one, we file this motion to ask the Court to consider the matter further and to modify its order.

The *per curiam* decision of the Court indicates that the cause is to be remanded to the district court for the conduct of an adversary proceeding. This might be construed to require, in cases of this kind, that the government deliver to defense counsel and the district court the logs of all monitored conversations in which the defendant was involved, and that a hearing should then be held to determine if the conviction was tainted by the use of evidence improperly obtained. We submit, however, that there are sound practical reasons why it would be better practice to require the government to submit the logs preliminarily for an *in camera* inspection by the district judge. This would not of course preclude the district judge from conducting further proceedings in instances where he found that a legitimate purpose might be served thereby.

On its face, the Court's opinion sets forth the principles which should govern disclosure by the government in all cases where there has been illegal electronic surveillance of a defendant's premises or conversation.[1] Conversations overheard by means of such surveillance may include the most arrant gossip—gossip having no conceivable relationship to any judicial proceeding. More often than not, the talk or gossip will involve or relate to third persons wholly unconnected with the case. Although particular items picked up by the surveillance may have no claim whatever to either truth or relevancy, they may have a high potential to cause embarrassment or serious injury. Disclosure in the context of an adversary proceeding, even assuming an effort to employ safeguards,[2] would seem an unnecessary risk in circumstances where the district judge can readily determine that the material in question is utterly irrelevant to the case before him.

We submit that an *in camera* examination of the records of any illegal eavesdropping by the trial judge, who could then order the production of any arguably relevant portions, would adequately protect the interests of the defendant. The government would in no sense be the judge in its own case; yet the danger of public disclosure of irrelevant and scan-

[1] There may be added considerations in cases involving national security. See Memorandum in Response to Motion to Amend the Petition for Certiorari in *Butenko* v. *United States* and *Ivanov* v. *United States*, No. 1007 Misc. and No. 885. See, also, concurring opinion of Mr. Justice White, *Katz* v. *United States*, supra.

[2] Attempts by the government to provide safeguards in the form of protective orders have not been uniformly successful.

dalous information concerning third parties would be minimized.[3]

There is clear precedent for a procedure which places upon the district judge the responsibility for determining when information which the government possesses may be relevant to the defense.[4] Thus, in applying the Jencks Act (18 U.S.C. 3500), this Court has stated that "when it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit the statement to the trial judge for an

[3] During the trial and appellate proceedings in this case it was discovered that certain conversations involving the defendant Kolod were overheard during the course of an illegal surveillance at the Desert Inn. The logs of those conversations were turned over to the district judge for an *in camera* inspection. When the trial judge determined that there was nothing in them that should be disclosed to the defense, they were sealed and made part of the record. These logs, which were reviewed by the court of appeals and are part of the record before the Court in this case, contain scandalous references to third parties.

[4] As noted above, this was the procedure adopted at an earlier stage in this proceeding when it was discovered that there had been electronic surveillance at the Desert Inn which involved Kolod. See the opinion of the court below, 371 F. 2d 983. Similarly, subsequent to the remand in *Hoffa* v. *United States*, 387 U.S. 231–234, the government, in addition to the conversation revealed in this Court, submitted to the district court for *in camera* inspection other conversations obtained by electronic surveillance which the government considered not arguably relevant. The district judge then determined that the materials submitted for *in camera* inspection "contain no information either remotely or peripherally relevant to the transactions and evidence on which these defendants were indicted and convicted." See *United States* v. *Hoffa, et al.*, 273 F. Supp. 141, 143 (N.D. Ill.). The court then resealed the exhibit so that it would be available for review by the court of appeals.

in camera determination." *Palermo* v. *United States,* 360 U.S. 343, 354. Similarly, where the production of grand jury minutes is involved, the Court has recognized that it is one of the trial judge's functions "to cause the elimination of extraneous matter * * *." *Dennis* v. *United States,* 384 U.S. 855, 875. A close analogy is also provided by Rule 16(e) of the Federal Rules of Criminal Procedure which authorizes the district judge to deny a defendant pre-trial discovery on the basis of the judge's *in camera* examination of materials submitted by the government.

There is no reason to believe that a procedure for *in camera* inspection by the district judge will be any less effective a means of protecting the defendant's rights in the situation presently before the Court than it is in the above instances. Here, too, the Court may be "confident that federal trial judges will devise procedural methods whereby their responsibility is not abdicated in favor of the unilateral determination of the prosecuting arm of the Government." *Palermo* v. *United States,* 360 U.S. 343, 361 (Brennan, J., concurring). Moreover, appellate review may be obtained in the same manner as in Jencks Act cases, *i.e.,* the material not disclosed may be sealed by the court and made part of the record to be submitted to the appellate court. See *Palermo* v. *United States, supra.*

For the foregoing reasons it is respectfully submitted that the Court's order of January 29, 1968, should be modified to provide that the cause be remanded for an *in camera* examination of all logs reflecting conversations involving petitioners and for

such further proceedings as the district judge may deem necessary and appropriate as a result of that examination.

ERWIN N. GRISWOLD,
Solicitor General.

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IN THE

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OCTOBER TERM, 1967

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RUBY KOLOD, WILLIE ISRAEL ALDERMAN, and FELIX ANTONIO ALDERISIO, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for Rehearing From the Denial of the Petition for a Writ of Certiorari

MEMORANDUM IN OPPOSITION TO MOTION TO MODIFY THE ORDER OF THE COURT

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MEMORANDUM IN OPPOSITION TO MOTION TO MODIFY THE ORDER OF THE COURT

The Solicitor General has asked this Court to modify the *per curiam* order of January 29, 1968, remanding the cause for an "adversary proceeding in the District Court," slip op., p. 2. The Solicitor General has asked that the Court permit the government to submit to the district court, *in camera,* all the logs of illegally monitored conversations. Then, after reviewing the material, the district court would, under the Solicitor General's proposed procedure, turn over to petitioners only those logs which it found to have some relation to petitioners' prosecution. Petitioners oppose the

Solicitor General's proposal, believing that it rests upon no tenable legal or factual foundation and that it would, in fact, deprive them of substantial Fourth, Fifth and Sixth Amendment rights. Petitioners have heretofore filed a Petition for Rehearing and a Reply Memorandum setting forth arguments and authorities on the question tendered by the Solicitor General's motion. This memorandum will not tax the Court's patience by reiteration of those arguments, but will cite them at appropriate points.

I. THE SOLICITOR GENERAL'S ARGUMENTS

The Solicitor General advances two contentions in support of his motion: First, he argues that much of the material overheard is irrelevant and scandalous—"the most arrant gossip"—and therefore disclosure of it will harm the interests of third persons whose names are mentioned or who may be participants in the monitored conversations. Second, he argues by implication the rationale advanced explicitly in *Ivanov* v. *United States,* No. 885, that disclosure will reveal the inner workings of investigative processes entitled to be free of such scrutiny.

A. The "Arrant Gossip" Rationale

The belated governmental concern with privacy and personal security is as self-serving as it is misplaced. The problem which the government professes to see can easily be met by means of a protective order under Rule 16(e), Federal Rules of Criminal Procedure. See *Dennis* v. *United States,* 384 U.S. 855, 875 (1966). Indeed, counsel for petitioners have every intention of asking the district court to order all parties not to disclose the contents of the overheard conversations to

anyone without a prior order of the court. Such an order would ensure that a defendant's right to protect himself from the government's illegal conduct is not to be conditioned upon disclosure of all the private thoughts and communications which the illegal conduct has monitored. A protective order to this effect has been entered in *United States* v. *Levinson, et al.*, Criminal No. 1561, D. Nevada, September 27, 1967.

The Solicitor General has, however, stated in a footnote to his Motion that "Attempts by the government to provide safeguards in the form of protective orders have not been uniformly successful." Petitioner is not aware of an instance in which a defendant or his counsel has been shown to have violated a protective order. On the other hand, the Solicitor General may not be aware of the shocking breach of privacy committed with the apparent connivance of agents of the government with respect to certain FBI microphone surveillances in Las Vegas. The details of these malefactions are set forth in an affidavit which counsel for petitioners have filed with the Clerk of this Court under seal, for examination by the Court and its personnel. The contents of the affidavit are thus safeguarded to protect the rights of the persons named therein. The affidavit presents the strongest of circumstantial evidence that the contents of illegally overheard conversations have at times been disclosed under circumstances suggesting that some government agents are less than entirely concerned with the rights of those victimized by illegal electronic surveillance. The risk thus presented cannot be met by an *in camera* proceeding, for the government's agents already know the contents of the illegally obtained material. The protective order procedure provided by the Federal Rules of Criminal

Procedure, reinforced by vigorous use of the contempt power, is a fair, equitable and adequate means of protecting third parties, defendants and the government.

B. The "Inner Workings" Rationale

Disclosure of the technique and fruits of illegal surveillance will, no doubt, require some revelation of the "inner workings" of governmental investigative agencies. It is entirely proper that this should be so,* for there is no conceivable justification in the present case for seeking to protect the confidentiality of Department of Justice investigative files relating to illegal surveillance. In the past, the Department has claimed the power to keep those files generally free from judicial scrutiny under a policy promulgated by the Attorney General. In *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951), the Court upheld such a regulation as a "housekeeping provision" validly requiring all requests for disclosure to be referred to the Attorney General. That holding does not of course grant an evidentiary privilege to the contents of Department of Justice files. Nor does any relevant statute or regulation provide authority for the course suggested by the Solicitor General. See Petition for Rehearing, *Kolod* v. *United States,* No. 133, October Term, 1967, p. 6 n. 3 [hereinafter cited as Pet. Reh.], and authorities there cited.

If the "inner workings" rationale be seen as a restatement of the federal decisional law of "executive privilege", it is inapposite when the government (1)

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* The discussion which follows does not reach the question presented by "national security" cases. See Reply Memorandum to Memorandum in Response to Motion to Amend the Petition for Certiorari, *Ivanov* v. *United States,* No. 885.

has conceded the illegality of its conduct, (2) is nonetheless attempting to put the petitioners in jail for substantial periods of time, (3) is pleading for secrecy with respect to the fruits of illegality and, (4) is making a disputed contention that the illegality did not taint the petitioners' conviction. *United States* v. *Coplon,* 185 F.2d 629, 636-40 (2d Cir. 1950), cited with approval on this very point in *Dennis* v. *United States,* 384 U.S. 855, 873 n. 20 (1966); *cf. Zimmerman* v. *Poindexter,* 74 F. Supp. 933 (D. Hawaii 1947).

Indeed, the rationale of *United States* v. *Andolschek,* 142 F.2d 503, 506 (2d Cir. 1944), cited with approval in *Dennis,* 384 U.S. at 873 n. 20, and *Roviaro* v. *United States,* 353 U.S. 53 (1957), dictates that, unless the government is willing to open its files to the extent necessary to ensure, through adversary proceedings in open court, that its unlawful conduct did not produce leads or evidence which contributed to petitioners' convictions, these cases must be dismissed.

This view of the executive privilege in this context also disposes of the Solicitor General's reliance upon Jencks Act cases such as *Palermo* v. *United States,* 360 U.S. 343 (1959), and the provisions of Rule 16(e), Federal Rules of Criminal Procedure. Jencks Act disclosures involve statements of witnesses interviewed by government agents; the witnesses are not parties to the litigation in which the statements are produced, and the investigative techniques leading to the taking of the statements are as a general rule lawful. Thus, the claim of the government to the privacy of its investigative files is the strongest possible. So also with discovery of the government's evidence under Rule 16. Here, however, the materials in question were obtained from a criminal defendant by means concededly un-

lawful. See Pet. Reh. 5, and cases there cited. The analysis above, as well as that in II, *infra,* demonstrates that in such a case the government has forfeited its claim to keep its files free from scrutiny.

C. The Scope of the Turnover

The Solicitor General's Motion to Modify apparently contemplates the turnover to the district court of only "the logs of all monitored conversations in which the defendant was involved," and not, for example, memoranda prepared from the logs or as a result of overhearing the monitored conversations. We do not read the Court's order of January 29 thus narrowly: The discussion at p. 2 of the slip opinion of the scope of the hearing to be held contemplates an "adversary proceeding" broad enough in scope to ensure that petitioners' convictions were not obtained in whole or in part as a result of governmental illegality.

In order to perform this task, the district court must review more than merely the logs of the monitored conversations. One telling reason why this is so is provided by the excerpts from testimony in the *Black* case set forth at pp. 4-8 of Reply Memorandum to Memorandum of the United States in Opposition, *Kolod* v. *United States,* No. 133, October Term, 1967. See also *Black* v. *United States,* 384 U.S. 983 (1966), in which this Court inquired of the use made of the "information" unlawfully obtained, as well as the details of the illegal surveillance, thus focussing not upon the logs and summaries of recorded conversations, but upon the far more significant question of dissemination. For the test of illegality is not whether information unlawfully obtained is itself introduced into evidence at trial, but the broader question whether by "the ex-

ploitation of the illegality," *Wong Sun* v. *United States,* 371 U.S. 471, 488 (1963), the government was led to evidence which was used against a defendant. This question cannot, of course, be answered by the mechanical comparison of logs to trial transcript. We turn, therefore, to a consideration of the scope of the hearing which ought to be granted in the district court.

II. WHAT KIND OF HEARING?

The precise scope of a hearing on illegal electronic surveillance cannot be judged in advance, but the general outline and underlying premise of such a hearing are clear: it must be open, subject to the safeguards of adversary procedure, and must permit the petitioners to follow the primary illegality through the government's filing system to see where it went and what use was made of it at each place it rested and in each form that it took. Only through the examination of records and the cross-examination of government agents can this inquiry take place.

In assessing this claim to a "free and open encounter", constitutional principles under the Fourth, Fifth and Sixth Amendments provide important governing standards.

A. A Defendant Is Constitutionally Entitled to Production in Open Court of All Logs and Summaries of All Conversations in Which He Was a Participant

This Court has suggested that a criminal defendant may have a due process right to discover his statements to the government. See *Clewis* v. *Texas,* 386 U.S. 707, 712 n. 8 (1967). See also Advisory Committee Notes to F.R. Crim. P. 16, 39 F.R.D. at 175-76, and cases there cited.

The Fourth Amendment also requires turnover to a defendant of the fruits of governmental illegality. The conceptual leap required to hold that the spoken word is within the protection of the Fourth Amendment, *Wong Sun* v. *United States,* 371 U.S. 471, 485-86 (1963); *Silverman* v. *United States,* 365 U.S. 505 (1961), and the subsequent renunciation by this Court of the "property rights" rationale for Fourth Amendment freedoms in favor of a "privacy" rationale, *Warden* v. *Hayden,* 387 U.S. 294 (1967); *Katz* v. *United States,* 36 U.S.L. Week 4080 (Dec. 19, 1967), make it necessary to redefine as well the "return of property" provisions of law which have been an historic means of vindicating the rights of those victimized by illegal searches. For it is clear that, in addition to suppressing unlawfully seized evidence to prevent its use at any subsequent trial or proceeding,* a trial judge must, under F.R. Crim. P. 41(e) and the case law it embodies, return to the movant the materials unlawfully taken. The application to unlawful seizures of intangible words of this rule of law does not pose insurmountable problems. Are the logs and summaries of monitored conversations really any different from letters or unpublished manuscripts, in which the author retains a right in the intangible literary property which may coexist with the rights of a possessor in the paper itself? The petitioners suggest not, and

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* A trial judge, after finding evidence to have been unlawfully taken, must order it suppressed even though it does not appear to have led to the prosecution of the movant. See, *e.g., United States* v. *Baker,* 262 F. Supp. 657, 667 (1966). Thus the issue upon a suppression hearing is, in general, broader than that of "relevance," once illegality and standing to suppress have been established.

therefore urge the Court to assimilate the seizure of intangible words, for purposes of a return of property, to the seizure of tangible chattels, just as the Court has done for purposes of suppression of evidence. Put bluntly, the government is not lawfully possessed of the contents of the logs and summaries of petitioners' conversations, having acquired them by criminal means. The government's title to the logs is no higher or better than any thief's title to the fruits of his illegal activity, and the defendant therefore has an absolute right to return of the materials.

B. The Open Hearing

By misconceiving the trial judge's function as being one of mechanical comparison of the logs of monitored conversations with the evidence taken at the trial, the Solicitor General has been led into error. The logs are the basis and beginning of the inquiry and not its end or object. Few prosecutors are so blind or venal as intentionally to introduce unlawfully monitored conversations into evidence. Indeed, the illegal surveillances revealed by the government thus far have as a rule been designed to gather intelligence from which to develop cases against the targets of surveillance rather than to produce evidence directly usable in a criminal trial. That being so, the nexus between the contents of the logs and summaries and the evidence introduced at trial may be attenuated, though not so clearly so as to be "purged of the primary taint," *Wong Sun, supra,* 371 U.S. at 488. The issue is not relevancy, but use and dissemination. The government should not, therefore, be able to foreclose a full adversary inquiry by the device of turning over the logs themselves for an *in camera* determination.

A striking analogy may be drawn from cases dealing with the right of a civil litigant to summary judgment, without permitting the opponent the opportunity to cross-examine the movant's witnesses and confute the documentary evidence upon which the movant relies. In *Garrett Biblical Institute* v. *American University,* 163 F. 2d 265 (D.C. Cir. 1947), the court reversed a grant of summary judgment for the appellee even though the appellant had not, in the court below, marshalled facts in opposition to the appellee's moving papers. The court reasoned:

> "Much, if not all, of appellant's defense depends on a cross-examination of appellee's witnesses and on examination of appellee's documentary evidence, and we feel that since the defense is asserted in apparent good faith appellant is entitled to a trial which provides this opportunity to them. On the record as it stands, we cannot say that 'it is quite clear what the truth is.' " 163 F. 2d at 267.

Garrett relied upon *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U.S. 620 (1944), in which this Court reversed a grant of summary judgment which had been based upon the affidavits of eight experts available only to the moving party. The Court dismissed the affidavits, saying:

> "But it [the moving party] may not withdraw these witnesses from cross-examination, the best method yet devised for testing the trustworthiness of testimony." 321 U.S. at 628.

It is only cross-examination which permits a witness's credibility to be put in issue. *Ibid.* As this Court said in *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464, 473 (1962), in terms as applicable to the circumstances of the present case as to the antitrust issues there at stake:

> "We believe that summary procedures should be used sparingly . . . where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. . . ."

All the more, of course, should summary procedures be suspect when invoked at the behest of a litigant with the burden of proving "by clear and convincing evidence," *United States* v. *Wade,* 388 U.S. 215, 240 (1967), that his illegal conduct did not taint the petitioners' prosecution.

The Solicitor General seeks more, of course, than the right to restrict the scope of the hearing below. He would have the crucial initial decisions made in the privacy of the district judge's chambers. The metes and bounds of conceded governmental illegality may, the Solicitor contends, be stricken off by an initial decision in secret made upon the basis of material selected by the government.

Such an inquiry violates the Sixth Amendment guarantee of public trial, which extends to pretrial proceedings as well as to the presentation of evidence before the jury. See *United States* v. *Sorrentino,* 175 F. 2d 721, 722 (3d Cir. 1949). In *DiBella* v. *United States,* 369 U.S. 121, 131 (1961), this Court said: "Orders granting or denying suppression . . . are truly interlocutory, *for the criminal trial is then fairly in train.*" (Emphasis added.) See also *Levine* v. *United States,* 362 U.S. 610 (1960); *In re Oliver,* 333 U.S. 286 (1948).

And, as petitioners contend that they should have the right in the Court below to examine the agents who conducted the illegal surveillance and other persons

who may have knowledge as to its use, a public proceeding will provide checks upon the veracity of those witnesses as well as tending to ensure that the turnover of materials to the court is based upon a conscientious scouring of government files. See Bentham, *Rationale of Judicial Evidence,* Bk. 2, ch. X, § 2 (1st ed. 1827); 6 Wigmore, *Evidence,* § 1834 *et seq.*

Nor, we think, should one be overly impressed with the protestations of utter good faith, and at times of outraged innocence, which permeate the Solicitor's pleadings. The Solicitor General cannot be aware of the character and extent of the governmental illegality he proposes to have the district court explore in so cavalier a fashion. Petitioners recall *United States* v. *Procter & Gamble Co.,* 356 U.S. 677 (1958). There the issue was: Had the government used the grand jury proceedings with no intention of securing an indictment but with the intention of gaining discovery for use in a civil antitrust case? This Court said that on the record no such finding could be made. The case went back to the district court, where the Attorney General admitted on written interrogatory that intent to seek an indictment had been abandoned near the end of the grand jury investigation. The district court granted the defendant access to the grand jury minutes from that point forward. *United States* v. *Procter & Gamble Co.,* 175 F. Supp. 198 (D.N.J. 1959). The court did not, however, accept the Attorney General's statement on faith, even though given under oath. It ordered the Department of Justice to produce all its records relating to the decision to seek an indictment and to its practice of using grand juries for discovery purposes. *United States* v. *Procter & Gamble Co.,* 25 F.R.D. 485, 488 n. 2 (D.N.J. 1960). Thereafter, depo-

sitions were allowed to be taken of the Attorney General, his executive assistant, the head of the Antitrust Division, his successor, the head of the Litigation Section of the Antitrust Division, and the attorney who conducted the grand jury proceedings. On the basis of this extensive discovery, the district court found that, contrary to the Attorney General's assertions, there had *never* been an intent to seek an indictment. Consequently, the court ordered all the grand jury minutes turned over to the defense. *United States* v. *Procter & Gamble Co.,* 187 F. Supp. 55 (D.N.J. 1960). The government chose not to appeal. *Procter & Gamble* illustrates graphically the dangers of abandoning the protections provided litigants by full and open hearings in favor of accepting, on faith, self-serving representations by government agents. In *Nardone* II, 308 U.S. at 342, this Court was willing to stand upon the presumption that law officers habitually obey the law. But that presumption, like any other, "is effective . . . only in the absence of evidence to the contrary." *United States* v. *Procter & Gamble Co.,* 174 F. Supp. 233, 237 (D.N.J. 1959). The wholesale, albeit belated and reluctant, disclosures of recent days—in this case and many another—have reduced the presumption to a shambles.

C. Concluding Observations

The Solicitor General asserts in his motion that his suggested procedure would mean that "the government would in no sense be the judge of its own cause." Motion to Modify the Order of the Court, p. 3. He is mistaken. By imposing procedural handicaps upon the petitioners in the Court below, by regulating the flow of materials to the district court, and by withhold-

ing from examination in open court the persons responsible for the illegality and for its possible cloaking in the preparation of the prosecution, the proposed *in camera* procedure is merely another means of permitting the government to escape an accounting for its malfeasance. This is not the first time that the government has sought to grant the form, but not the substance, of relief from the results of its wrongdoing. We referred in the moving papers under Rule 25(2) after denial of certiorari to *McGarry* v. *United States*, No. 6925, 1st Cir., December 29, 1967, rehearing denied, February 2, 1968, cited at Pet. Reh. 3a. There, the government waited until the jury was in the box to disclose illegal electronic surveillance, and the defendant was put to a hearing with no opportunity to prepare, before an impatient judge, and with a jury waiting in the anteroom anxious to embark upon the trial.

The scope of the government's surveillance activity is still not known, but the disclosures already made portend that a great effort by judges and litigants will be necessary to purge the government's files of all taint of illegality. It may be tempting to seek shortcuts to that end, and the government must especially wish that the embarrassing round of disclosures and hearings will soon be over. But the Solicitor General's suggestion would not obviate, but would rather compound, the illegality, by superimposing upon it a constitutionally defective hearing and, more important, by teaching those responsible for the unlawful conduct that they may safely retain the fruits of their crime. See generally *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905 (1955).

III. CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the Motion to Modify the Order of the Court be denied.

Respectfully submitted,

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